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MOOT CASE ON MURDER AND ARSON

R. M. JACKSON

[The following is an account of a moot case tried at a meeting of the C.U. Law Society, 30th September, 1945. The Judges were Dr. R. M. Jackson, Mr. R. W. M. Dias, B.A., LL.B., and Mr. C. Grunfeld, B.A. Counsel for appellant were Mr. W. Kentish and Mr. D. Smart; for Crown, Mr. W. D. Espley and Mr. R. A. F. Kayode.—ED. C.L.J.]

WILLIAM STYLES was tried at the Oxbridge Assizes on charges of murder and arson. The evidence for the prosecution showed that Styles was the owner and manager of a shop with extensive storerooms, and that at 10 p.m. on the 21st June, Styles deliberately set fire to the building in order to claim the insurance money. John Doe, a storekeeper employed by Styles, was burned to death. No evidence was produced as to why Doe was in the building at that hour. The staff usually left at 6 p.m. though it was not unknown for members to stay later, although no instance of anyone staying as late as 10 p.m. could be adduced. Styles did not search the building before he set it on fire.

The Judge instructed the jury that if they accepted the evidence of the prosecution they should find that Styles had committed the felony of arson; and that if the death of Doe occurred in the course of or in direct consequence of the commission of that felony, they could properly find Styles guilty of murder. The jury found Styles guilty of murder and it is against that conviction that he is appealing to the Court of Criminal Appeal.

JUDGMENT

Both counsel for the appellant and counsel for the Crown agreed that the law used to be that where a prisoner in the course of committing a felony caused the death of a human being that was murder, even though he did not intend it or foresee that death or injury might result. If that doctrine were still the law, it is clear that the appellant must have been guilty of murder, for there is no doubt that the death of Doe was attributable to a fire caused by the appellant in the commission of the felony of arson. But it was also common ground that the old law of constructive murder has been modified during the last hundred years. Counsel for the appellant submitted that a chain of cases,¹ either in the decisions or in *obiter dicta* or in comment by the editors of the reports, shows that the old rule has been replaced by a more humane test. On this

¹ *Horsey* (1862) 3 F. & F. 287; *Luck* (1862) 3 F. & F. 483; *Vamplew* (1862) 3 F. & F. 520; *Skeet* (1866) 4 F. & F. 931; *Serné* (1887) 16 Cox, 311; *Whitmarsh* (1898) 62 J. P. 711; *Bottomley and Earnshaw* (1903) 38 L. J. N. 311; *Lumley* (1911) 22 Cox, 635.

view the direction to the jury should be: 'When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result?'

The appellant then considered the bearing of *Beard's Case*² upon the earlier cases. In that case the prisoner had raped a girl, and in the course of committing that felony he had struggled with her and had placed his hand over her mouth and had pressed her throat to stop her screaming and had thus caused her death by suffocation. Much of the argument before this Court and the House of Lords was on the question of intoxication as a defence, and we are now concerned solely with the ruling contained in this passage from the speech of Lord Birdenhead: '... the evidence established that the prisoner killed the child by an act of violence done in the course or in furtherance of the crime of rape, a felony involving violence. The Court [of Criminal Appeal] held that by the law of England such an act was murder. No attempt has been made in your Lordship's House to displace this view of the law, and there can be no doubt as to its soundness.'³ In the case now before us the submission for the appellant was that the rule in *Beard's Case*² is limited to felonious acts involving violence to the person.

On behalf of the Crown it was submitted that some felonies are such that no person committing one of them could reasonably contemplate that his act might cause any bodily harm to anyone. An instance would be simple larceny. But there are many felonies which by their very nature create conditions dangerous to people. The Court can properly take judicial notice of the fact that fires in buildings do in fact result in a number of people being burned to death. The essence of 'violence' is that death or injury may be the result of it, and as arson may well produce this result it follows that arson must be classed as a violent felony. ✓

We agree that the language used in the House of Lords in *Beard's Case*² is not so clear that there is no room for different interpretations. This Court has, however, had occasion to apply the rule in *Beard's Case*,² and we think that although the decisions previously given do not expressly limit the term 'violent felony' to an act of violence against the person the implication is that it should be so limited. In 1930, in *Betts and Ridley*,⁴ the prisoner Betts had in the course of committing robbery seized a man by the throat and struck him a blow on the top of his head, from which, or from a fall caused thereby, he died. In that case the jury were directed that they could convict of murder if they found that the act 'was calculated in the judgment of ordinary people to cause death.' This Court pointed out that that direction was more favourable to the prisoner than it might have been, and that the Judge would have been correct in directing the jury that it is murder to cause a death

² (1919) 14 Cr. App. R. 110 and 160.

³ At p. 187.

⁴ 22 Cr. App. R. 148.

'while in the act of committing a felonious act of violence against the person.' In *Stone*,⁵ in 1937, the prisoner had used violence against a girl with intent to ravish her. It is true that an attempt to rape is a misdemeanour and not a felony, but this Court was following *Beard's Case*⁶ in holding that the violence to the person was in furtherance of the commission of a felony. The rule was next considered in *Larkin*⁷ in 1942, where the prisoner on his own showing had flourished a razor in what must be construed as an assault upon a man and had as a consequence of that conduct cut a woman's throat. In a recent case, *Jarman*⁸ in 1945, the prisoner pointed a loaded revolver at a woman and demanded money, and had, on the prisoner's account of it, accidentally shot the woman. In all these instances in which *Beard's Case*⁶ has been considered it seems to have been assumed that a 'felony of violence' is limited to acts of violence against the person, and in view of this we do not feel that it is open to the Court to hold that arson is a violent felony.

Where death has resulted in the course or in the furtherance of the commission of a felony, the law, and therefore the direction to the jury, differs according as the felony is or is not one of violence to the person. The essential part of the direction in the former may be cited from *Jarman*:⁸ 'He who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim.' Where the act is felonious but not one of violence to the person, we agree with the submission of counsel for the appellant that the test is: 'When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result.'⁹

In the appeal before us it is thus clear that the jury were not properly directed. It is possible that if they had been properly directed they still might have convicted of murder, for they might have felt that a reasonable man must have contemplated that setting fire to this building was likely to hurt someone, but their verdict would depend on all the circumstances of the particular case: we cannot say that they certainly must have convicted, and therefore the conviction of murder cannot stand.

For the verdict of murder we substitute a verdict of manslaughter, but before saying anything upon that we think it convenient to make some observations upon the rules governing death caused in the course of committing a felony. It has been suggested that the sole test should be foresight of the consequences, and that *Beard's Case*⁶ has nullified progress in rationalising the law of murder.¹⁰

⁵ 53 T. L. R. 1046.

⁷ 29 Cr. App. R. 18.

⁹ *Lumley* (1911) 22 Cox, 635.

¹⁰ J. W. C. Turner, paper in *The Modern Approach to Criminal Law* (1945), p. 257.

⁶ (1919) 4 Cr. App. R. 110 and 160.

⁸ [1946] 1 K. B. 74, 80.

We have pointed out that *Betts*¹¹ was convicted on a direction to the jury that did not rest upon *Beard's Case*¹² but depended upon the foresight of the consequences of his act, although direction on the rule in *Beard's Case*¹² would have been proper. In *Stone*,¹³ *Larkin*,¹⁴ and *Jarmain*¹⁵ the jury would certainly have been entitled to convict if the direction had been as in *Lumley* instead of on what is thought of as the far stricter rule for a violent felony. It is not unreasonable to say that he who uses violence against the person, or threatens violence with dangerous weapons like razors and loaded firearms, must know that he will probably kill or do grievous bodily harm. *Beard's Case*¹² has not led to any decision making a man liable for murder in circumstances in which he would not have foreseen that death or serious injury might be caused by his acts.

The offence of manslaughter has for a long time been regarded by our law as a felonious homicide that is less heinous than murder. Hence the development of the law of murder has had profound effects upon the law of manslaughter. In the middle ages, and as late as the time of Lord Coke, it was established law that he who caused a death in the course of committing an unlawful act was, in the absence of lawful excuse, guilty of murder. By the eighteenth century the law had been modified, as we find in *Foster*, to the rule that the act must be not merely unlawful but definitely a felony. Then, as appears in this judgment, there has been a further change in that the requirement is now that the felony must be one of violence to the person.

These three stages in the development of what is sometimes called constructive murder have left their mark upon the law of manslaughter, for each time the law of murder has advanced, the homicide that formerly would have been murder has been regarded as manslaughter.

First, then, manslaughter may occur when the prisoner was not doing an unlawful act. The test of liability has come to be recklessness, which is often expressed as being a high degree of negligence.¹⁶

Second, the prisoner may have been doing an act that was unlawful but not felonious. Here there has been some modification, and the mere fact that an unlawful act was being committed is not sufficient;¹⁷

¹¹ 22 Cr. App. R. 148.

¹³ 53 T. L. R. 1046.

¹⁵ [1945] 1 K. B. 74.

¹² (1919) 4 Cr. App. R. 110 and 160.

¹⁴ 29 Cr. App. R. 18.

¹⁶ 'If a person is engaged in doing a lawful act, and in the course of doing that lawful act behaves so negligently as to cause the death of some other person, then it is for the jury to say, upon a consideration of the whole of the facts of the case, whether the negligence proved against the accused person amounts to manslaughter, and it is the duty of the presiding Judge to tell them that it will not amount to manslaughter unless the negligence is of a very high degree. The expression most commonly used is "unless it shows the accused to have been reckless as to the consequences of the act." That is the law where the act is lawful. Where the act which the person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.' *Larkin* (1942) 29 Cr. App. R. 18, at p. 32.

¹⁷ *Franklin* (1883) 15 Cox, 163; the unlawful act of taking a box and throwing it off Brighton pier did not ground liability for manslaughter when a person swimming in the sea was accidentally killed.

the act must be one that is likely to injure another person. There is a tendency for these two classes to become confused if not merged. On the one hand there are cases such as *Franklin*¹⁸ in which the unlawfulness of the act appears irrelevant; persons swimming in the sea are put in danger if objects are thrown off piers irrespectively of whether the person throwing the object owns that object or has taken it unlawfully. On the other hand, the notion of an unlawful act is not free from difficulty. Driving a motor vehicle recklessly or dangerously is an indictable misdemeanour under sect. 11 of the Road Traffic Act, 1930, but if the driver causes a death he is not necessarily guilty of manslaughter.¹⁹ The practice has been to look at the prisoner's act in a wide sense, and to say that the driving of a motor vehicle is a lawful act rather than to look more closely and say that driving contrary to the provisions of the Traffic Acts is an unlawful act. But it is not necessary to the present case to consider the difficulties that have arisen in that field.²⁰

Third, the prisoner may have been doing an act that was felonious. There is no early authority for a death caused in the course of such an act being manslaughter for the obvious reason that our law held it to be murder. The historic process of narrowing the law of murder has proceeded by a process of reducing the homicide to manslaughter. Hence when the Courts held that for constructive murder the felony must be one of violence to the person, they did so by holding that death caused in committing a non-violent felony is manslaughter. Now we have accepted the authority of those cases²¹ on the law of murder, and we cannot do that and at the same time question their authority on manslaughter. It follows that we are bound to hold that the appellant in the present case committed manslaughter.

It may be that this third category of manslaughter should be modified, as the second has already been partially modified, so that the test for all cases of manslaughter would become the same. But this Court cannot, in view of the precedents, take that step. That is for the House of Lords²² on an appeal or for Parliament.

In what has been said above, this Court does not want to be understood as meaning that the present appellant is guilty of manslaughter merely through a technical rule. We repeat, a burning building is a dangerous thing, and if the jury had been properly directed they might have convicted of murder. Further, if the appellant had had no intention to defraud, and so had not committed arson, it is difficult to see how a jury could have failed to convict on an indictment for manslaughter. In substituting a verdict of manslaughter for that of murder, the sentence will be penal servitude for five years.

¹⁸ See n. 17, previous page.

¹⁹ *Stringer* (1933) 24 Cr. App. R. 30.

²⁰ See J. W. C. Turner, *Modern Approach to Criminal Law*, p. 231 *et seq.*

²¹ See footnote 1 above. In all those cases it was taken for granted that if the act was not murder it was manslaughter.

²² The House of Lords considered the law of manslaughter in *Andrews v. D. of P. P.* [1937] A. C. 576, but that does not preclude the House from making a comprehensive survey of the law if opportunity arises.

THE NATURE OF USUSFRUCTUS

KOPEL KAGAN

NO satisfactory definition of *Dominium* in Roman Law has yet been achieved. Amongst English writers Austin many years ago found great difficulty in this question¹ while in modern times Professor Buckland has written² 'it is thus difficult to define *Dominium* precisely.' Again, Poste, dealing with Gaius' discussion of *dominium*, says³ that his opening statements are 'deplorably confused.' These examples are enough to indicate the condition of uncertainty which prevails. In my submission this uncertainty exists mainly because the conception of *ususfructus* has never yet been explained adequately. Of *Possessio* it has been said⁴ 'the definition of *Possessio* to give the results outlined is a matter of great difficulty. No perfectly correct solution may be possible,' and this statement is generally accepted as a correct assessment of the present position in juristic literature. But here, too, in my opinion, the reason is again connected with usufruct, for the *possessio* of the usufructuary has not yet been adequately determined. Gaius (2:93) tells us 'usufructuarius vero usucapere non potest; primum quod non possidet, sed habet ius utendi et fruendi.' Ulpian holds that he had *possessio* in fact ('Naturaliter videtur possidere is qui usum fructum habet' D.41.2.12). On this subject Roby says 'the fructuary was not strictly a possessor and therefore if he was deprived from enjoying he had not a claim to the original interdict *de vi* but in virtue of his quasi-*possessio* a special interdict was granted him.' Austin saw difficulty in the whole problem of *possessio*. He wrote⁵ 'by Savigny in his treatise on *possessio* it is remarked that the *possessio* of a right of usufruct . . . resembles the *possessio* of a thing, by the proprietor, or by an adverse possessor exercising rights of property over the thing. And that a disturbance of the one possession resembles the disturbance of the other. Now this must happen for the reason I have already stated:—namely, that the right of usufruct or user, like that of property, is indefinite in point of user. For what is possession (meaning legal possession not mere physical handling of the subject) but the exercise of a right ?'

It seems plain that this confusion with regard to possession in general and possession of usufruct in particular is due to the fact that the conception of usufruct has never been properly clarified.

No answer has yet been given to the question of the justification for

¹ Jurisprudence, II, p. 866.

² Buckland, Manual of R. L. p. 112.

⁴ Buckland, Text-book, p. 197.

³ G. 2, 1 to 14.

⁵ *Op. cit.* p. 866.

the distinction between *res corporalis* and *res incorporalis* in Roman Law. This problem too depends upon the proper explanation of usufruct.

Another institution of Roman Law which cannot be properly understood unless the true nature of usufruct is ascertained is that of servitudes especially as usufruct has been called a personal servitude. This connexion of servitude with usufruct has often engaged the attention of writers on Roman Law. Austin took great pains over it and his analytical mind led him to appreciate the difficulty of the question. Thus he says:—⁶

‘I shall examine the rights of property or dominion . . . which, in the Roman Law, are ranked improperly (as I conceive) with rights of servitude. It is of no small importance, that this confusion of disparate objects should be pointed out and cleared up. Without such a previous explanation, a great portion of the Roman Law, and of the modern systems which have borrowed its terms and classifications, are to an English lawyer inexpressibly perplexing.’

After discussing personal and real servitudes Austin continued—⁷

‘From the distinction between real and personal servitudes I proceed to certain rights which in the language of the Roman Law and of modern systems which borrow its terms and classifications are improperly (as I conceive) styled servitudes. For, in all these cases, the party entitled to the so-called servitude has an indefinite power or liberty of using or dealing with the object. The right, therefore, is not a definite subtraction from the indefinite power of user or exclusion residing in the owner of the subject. It is not a servitude properly so-called but a mode of property or dominion.’

And again—⁸

‘A remarkable thing is, that these miscalled servitudes are the only servitudes which are styled formally and usually, *personal servitudes* . . . Here, however, is a mistake. For though it would be a personal servitude it would not be *ususfructus*; *ususfructus* imparting to the party entitled an indefinite power of user, and being in effect a mode of property.’

Austin’s solution is that servitudes are divided into two kinds. He calls real servitudes by the name of proper servitudes and personal by the name of improper servitudes. Everyone can see that Austin was not successful in this matter, for by classifying servitudes as proper and improper or by stating that usufruct is miscalled servitude the problem has not been solved.

It is necessary, therefore, in the first place to ascertain, if possible, what was the nature of *ususfructus*. Commentators have had different ideas on this question, and have found difficulties, and therefore have come to hold opposing views, because there are some passages in the

⁶ *Op. cit.* p. 836.

⁷ P. 853.

⁸ P. 854.

sources which on the face of them state that usufruct was a *pars dominii*, while there are other passages which seem to state that it was not a *pars dominii*. Those who adopt the former statements as correctly indicating the law, have only, of course, to get rid of the apparent difficulty created by the passages which are negative. Those however who accept the negative passages as meaning what they seem to state, are confronted with the question, What was usufruct if it was not a *pars dominii*? Amongst modern writers the most striking attempt to provide the answer to this question was made by Professor Buckland in an article written in 1927.⁹ It is necessary then, in the first place, to examine Professor Buckland's theory. The author approaches the subject by considering the conception of usufruct in its relation to servitude. He decides that in classical times usufruct was not a servitude, but that later it was classified as a servitude. He adds that it is commonly suggested that the change was due to Justinian or was at least Byzantine; but that it seems equally likely that it crept in towards the end of the classical age, and that as there is not sufficient evidence to show interpolation of the text of Marcian (Digest, 8.1.1.), almost the last of the classical lawyers, there is therefore a possibility that the change came about then.

Buckland cites Pampaloni to the effect that usufruct was a *pars dominii* which the holder had in a distinct way; and says that in many of his conclusions he is independently confirming results already obtained almost at the same time by Riccobono. Buckland discusses the problem at some length and refers to Riccobono's opinion that the conflicting statements on the question whether it was a *pars* or not, and indeed of what it was a *pars*, *rei* or *dominii*, show that it was hard to find a juridical category for usufruct.

Professor Buckland then suggests his own solution as follows:

'Usufruct was a *ius*, a "*merum ius*" having no juridical relation to the physical thing, differing in this respect from praedial servitudes, which were essentially attached to *praedia*. It was for the jurists to say what consequences followed from this conception. A right cannot exist wholly, so to speak, in the air. If it has no relation to a physical thing, it must be in relation to a person to whom it can immediately attach as a right.'

The question whether usufruct was a servitude or not was one of considerable importance. Professor Buckland admits, however, that in classical law it was not a servitude, and it is therefore difficult to understand how he can arrive at a theory that usufruct was a *merum ius* in face of the fact that we do not find anywhere in the Digest that usufruct was ever so called, while we do find this terminology used in connection with servitude. Only that which is an incorporeal right not containing

⁹ 'The Conception of Usufruct in Classical Law,' *Law Quarterly Review* (1927), CLXXI, p. 326.

any corporeal things in itself and which is also not capable of independent ownership, and could not be counted in a person's goods, could be named a *merum ius*; and a servitude is such right. Buckland himself states that servitudes were burdens attached to *praedia*. So also Austin who writes:¹⁰

'In every case of a right of servitude, the thing which is the subject of the right, and not the owner or other possessor of the thing, is said to be burdened with the servitude.' Again at p. 847. 'The *praedium* is erected into a legal or fictitious person, and is styled "*praedium dominans*."'

This view was shared by Sohm¹¹ who says of praedial servitudes, 'In all these cases one piece of land serves another;' and by Walker in his introduction to Book 8 of the Digest where he cites Warnkoenig's opinion that a servitude is a quality imposed on a thing. It is thus accepted by most writers that servitudes have no independent existence.

Now it is true that usufruct was also a *res incorporalis*, yet it does not satisfy the above mentioned requirements because it contained corporeal things and was capable of an ownership which resembled the ownership of the corporeal thing itself; it therefore could not properly be termed a *merum ius*. It is material to note that Gaius in 2.14, when describing usufruct as a *res incorporalis*, places it in the same class with inheritance, whereas he mentions servitudes in another class. Now if usufruct was a *merum ius*, then it would follow that *hereditas* should also be a *merum ius*, which of course could not be the case.

Again, when Gaius (2.54) gives the reason why in *usucapio lucrativa pro herede* one year's possession was enough even for land he says, 'The reason why even land in these circumstances demands only a year for usucapio is that in ancient times the possession of the property belonging to an inheritance was held to be a means of acquiring the inheritance itself, and that in one year; for while the law of the Twelve Tables fixed two years for usucapio of land and one year for usucapio of other things, an inheritance was held to fall under the category of other things, as it is neither land nor corporeal.' (Poste's translation.) Clearly, it follows from Gaius that a *res incorporalis* which contains corporeal things is not a *merum ius*.

Sir Henry Maine writes:—¹²

'A *universitas juris* is a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person . . . It is not formed by grouping together any rights and any duties. It can only be constituted by taking all the rights and all the duties of a particular person. The tie which so connects a number of rights of property, rights of way, rights to legacies, duties of specific performance . . . which so

¹⁰ Jurisprudence, vol. II, p. 845, lecture 50.

¹¹ *Institutes of Roman Law* (Ledlie, 3rd ed.), 342.

¹² *Ancient Law*: Pollock's ed. p. 192.

connects all these legal privileges and duties together as to constitute them a *universitas juris* is the fact of their having attached to some individual capable of exercising them. Without this *fact* there is no university of rights and duties. The expression *universitas juris* is not classical, but for the notion jurisprudence is exclusively indebted to Roman Law; nor is it at all difficult to seize . . . A man may owe more than he is worth . . . But for all that, the entire group of rights and duties which centres in him is not the less a *juris universitas*.'

Can we say that the universal successor who succeeded to a *universitas iuris* succeeded to a *merum ius*? We cannot say that, because the Roman jurists did not hold this view. See Dig.5.3.50 pr. 'Hereditas etiam sine ullo corpore iuris intellectum habet.' ('An inheritance may have an existence in the eye of the law, though it is not a corporeal thing,' Monro's translation). See also Dig.50.16.23. The same applies to usufruct. Usufruct was a collection of rights. The tie which connected a number of legal privileges such as *fructus civiles*, *fructus naturales*, services of animals, and their offspring, services of slaves, and stipulations of slaves, so as to constitute them a usufruct is the fact of their being attached to some individual capable of exercising them. Thus it must be more than a *merum ius*.

Furthermore, an examination of many other passages appertaining to usufruct, seems to establish that the *merum ius* theory is untenable. Let us consider some examples.

First, Dig.7.1.23.1.

'etenim modicam quoque castigationem fructuario competere Sabinus respondit et Cassius libro octauo iuris ciuilibis scripsit, ut neque torqueat, neque flagellis caedat.'

The usufructuary thus has the right to chastise the slave and the *dominus* cannot complain if he does so; he must however not so harm the slave as to reduce his value (h.t.66). Now, in Dig.47.1.0.15.37, Ulpian, in commenting upon the interdict against those who beat another's slave, states that the action is not available for the usufructuary against the *dominus* nor *vice versâ*. This passage incidentally puts the usufructuary on the same level with the *dominus*, but for our present point it again shows that the usufructuary had the right to inflict reasonable corporal punishment on the slave.

How can it be that the right to inflict corporal punishment is compatible with usufruct's being a *merum ius* to the *usus* and the *fructus*?

Second, Dig.41.1.43.2.

'et cum ex peculio quod ad fructuarium pertinet solverit, intellegitur fructuarii homo fuisse: cum vero ex eo peculio, quod proprietarium sequitur, solverit, proprietarii ex post facto fuisse videtur.'

See also Dig.15.1.19.2. We see clearly from these passages, that a slave in usufruct could have two *peculia*; one from the bare proprietor

and the other from the usufructuary. Here again, the usufructuary is placed in exactly the same position as the *dominus*; yet no one can maintain that the right of the *dominus* is a *merum ius*. Legally the *peculium* was the usufructuary's property, but practically in dealing with the third parties it was regarded as the slave's property. Let us imagine a case in which the *peculium* of the usufructuary's slave consists of twenty ships and two hundred slaves and let us assume that the slave does business for the usufructuary involving vast sums of money. Will we then call the usufructuary's right in the slave a *merum ius*? Again, from the argument in Dig.7.4.15 it is clear that when a slave is held in usufruct the bare proprietor cannot free him: if usufruct were no more than a *merum ius* the *dominus* could not be thus restricted.

Again, in Dig.7.1.7.1. Labeo is quoted as stating that if you have the usufruct in a house the *dominus* may not, without your consent, raise it higher; nor, according to Nerva in h.t.13.7 may the usufructuary do so any more than the *dominus* may. Again, *dominus* and usufructuary are put on the same footing, a rule which is incompatible with the theory that the usufructuary had a *merum ius*.

Returning to Dig.7.1.7.1 we find that Ulpian says of the usufructuary:—

‘Unde etiam mitti eum in possessionem uicinarum aedium causa damni infecti placuit, et iure dominii possessurum eas aedes, si perserveretur non caueri, nec quicquam amittere finito usu fructu.’

This means that the usufructuary can take the usual proceedings allowed to a *dominus* for *damnum infectum* and that if all the stages of these proceedings are carried through (because the owner of the defective premises persists in not giving the required security) then the usufructuary ultimately will obtain ownership of the premises, and these will not have to be handed over to the *dominus* when the usufruct comes to an end. How can this result be possible if usufruct be a *merum ius* to *usus* and *fructus*? Roby gets out of the difficulty¹³ by the expedient of stating ‘This accession of property was regarded as a *fructus*.’ But it most decidedly cannot be a *fructus* of the *praedium* held in usufruct, and Roby gives no authority for his statement that it was regarded as one.

Professor Buckland says that usufruct is attached to the personality of the usufructuary in a way in which such a right as *dominium* is not. But even if this were so it still would not prove that usufruct is a *merum ius*. Austin indicates the true explanation when he says¹⁴ ‘Even admitting that it was only for the life of the fructuary, the limitation was only an accidental consequence of an accidental provision of Roman Law.’

Actually, the reason why usufruct was attached to the person and was extinguished by the death of the person or his *capitas deminitio* or

¹³ *De Usufructu*, p. 58.

¹⁴ *Op. cit.* lecture 50.

in other ways, was because it was desired to prevent the rights of the usufructuary depriving the owner of all his rights, and leaving *him* with a mere title alone. Thus Gaius (D.7.1.3.2) says 'Ne tamen in uniuersum inutiles essent proprietates semper abscedente usu fructu, placuit certis modis extinguere usum fructum et ad proprietatem reuerti.' The fact that the usufruct was attached to the person of the usufructuary goes to prove not that it was a *merum ius* but rather that it was not. Nor does the fact that the usufruct was not attached to the physical thing prove that it was a *merum ius*. When the Romans spoke about dominium they had not in mind the object but the ownership of the object. All things which were included in the ownership, be it the physical thing or any other rights, were on equal footing in regard to the ownership. (See D.50.16.23.)

Many writers have found it difficult to understand why the Roman lawyers divided *res* into corporeal and incorporeal. The difficulty lies in the question why some *res* are called corporeal, since, as we are concerned with the right and not with the *res*, all rights are in fact incorporeal and it is the right which matters for ownership in Roman Law. Each of the writers gives his explanation of the difficulty, but all are agreed that in the legal notion there is no division.

Austin, writes:—¹⁵

'things are divided by Roman lawyers into "corporeal and incorporeal"; by "incorporeal things" they understand not the subject of rights and obligations but the rights and obligations themselves. By "corporeal" they meant sensible or perceptible through the senses or in that philosophical jargon which they borrowed from the Greeks they meant by "corporeal," tangible. For in the language of the Stoics and also of the Epicureans all the various senses were considered as organs of touch.'

Thus Austin considered the distinction to be foreign to Roman law and in a later lecture¹⁶ he says that the distinction is utterly useless.

Moyle writes:—¹⁷

'The division of *res* into corporeal and incorporeal was in origin a philosophical one derived from the Stoics. If this distinction is to be used in law it must be remembered that a *res* which is philosophically *corporalis* or *incorporalis* need not be either legally; it becomes so only if the law takes notice of it.'

Moyle gives also the reason held by Hunter who points out that the most striking difference between *res corporalis* and *incorporalis* was that the former could be transferred only by actual delivery of the object which for the conveyance of the latter was unnecessary and often impossible. See also Jolowicz,¹⁸ who considers the distinction to be strictly illogical and says that a cow over which I have the usufruct is no less

¹⁵ *Jurisprudence* (4th ed.) vol. I, p. 371, lecture 13.

¹⁶ *Op. cit.* vol. II, p. 804, lecture 46.

¹⁷ *Institutes of Justinian*, 4th ed. p. 213.

¹⁸ *Historical Introduction to Roman Law*, p. 426.

corporeal than one I own. We see the opinion of the writers we have just quoted is that the nature of the *dominium* ought not be affected by the difference in classification. For in fact, whether what was owned was named *res corporalis* as an estate, a slave, or a chariot, or whether it was named *re incorporalis* as an inheritance or a usufruct, for the Romans the *dominium* was the same. If this be so then it follows that the fact that usufruct was not attached to the physical thing does not prove that it was a *merum ius*.

That usufruct was not a *merum ius* can be seen from the value given to usufruct when it was necessary to estimate its value. Roby quoting Stephanus, says:—¹⁹

‘It would happen sometimes that the property may have consisted entirely in slaves and animals which in the course of time would die or become worthless, so that the propriety would be worth nothing.’

Roby shows that it is possible that a usufruct should exceed the value of three-fourths of the property; when a usufruct was left to anyone under the age of 20 years, it was reckoned by Ulpian at 30 years’ purchase, and the same value was very commonly adopted according to Macer, when the age was under 30 years. Roby goes on to say that a usufruct of all the property left to anyone under the age of 40 or 41 years would exceed in value three-fourths of the fee. Can we reasonably say that an interest which was sometimes three-quarters of the value of the estate could have been regarded as a *merum ius*?

In a footnote on page 338 of the same article Professor Buckland writes:—

‘Professor Riccobono has kindly drawn my attention to D.2.8.15.1. A “possessor” of land did not give security in a case of appeal. The fructuary is not “possessor” for this purpose—the proprietarius is. Yet uxor is possessor or *res dotales* (n.2.3), though her right is obviously deferred. But it is not a *merum ius*, like that of fructuary.’

Professor Buckland here finds a difficulty in the difference of the law concerning the giving of security by a defendant. A wife did not need to give security, but a usufructuary did. According to his theory, the difference in law is due to the fact that usufruct is a *merum ius*. But the Digest itself shows that the giving of security had nothing to do with the question of the ownership, but was concerned with the question of having legal possession. He who had legal possession was exempted from giving security and he who had no legal possession was forced to find security. A wife had legal possession in the *res dotales* but a usufructuary had no legal possession, and therefore, he had to give security. See D.41.2.12.1 and 52. pr. where it is clear that the fact of the usufructuary’s

¹⁹ *Op. cit.* p. 168.

not having legal possession is not relevant to the question of whether he was an owner; so it is plain that this question of security provides no support for the theory of *merum ius*.

In further support of his theory that usufruct was a *merum ius* Professor Buckland, speaking of D.35.2.1.9, says in the above article (p. 338):—

‘In relation to legacy we have an interesting trace of the altering conception of usufruct. The point discussed is how the *l. Falcidia* is to be applied to a legacy of usufruct. The “*veteres*,” which here must mean the lawyers of the Augustan age, held that the usufruct must be valued, and a deduction made, if necessary on that valuation. But Aristo, “*a veterum opinione discessit*,” and held that the matter could be dealt with by keeping back so much of the usufruct as would be kept out of a legacy of the physical thing. The older opinion takes a very abstract point of view. It is impossible to detach part of a “*merum ius*.” It was not till the time of Aristo, who lived well into the second century, that the common-sense view was taken, that if so much was kept back as would have been kept back in an ordinary legacy, the desired effect would be produced in a more convenient way.’

Professor Buckland suggests that it is impossible to detach part of a *merum ius* (in this case usufruct) because we find elsewhere that a man cannot conceivably be forcibly expelled from a *merum ius*. In this footnote he gives us the case where it is said that a man cannot be expelled (D.41.3.4.26). Now when this passage is examined it will be found that it does not speak about usufruct, but only about servitude. Servitude is merely a quality, a betterment in the land, which cannot be detached from the land and that is why a person cannot be forcibly expelled from it. The suggested rule, however, that a person cannot be expelled from a *usufruct* is not to be found in any text in the Digest.

His other reference is to D.33.2.1, a text which does not seem to relate at all to our present point. For there it is stated that a usufruct of a servitude cannot be given as a legacy, because only usufruct of things which are *in bonis* can be bequeathed and a servitude is *neque ex bonis neque extra bona* and cannot therefore be bequeathed in usufruct. But this passage deals with the nature of servitudes, not with the nature of usufruct, and servitudes are rights which are not counted in a person's belongings and have no market value because they cannot be hired or sold, as Ulpian states (D.19.2.44), ‘*Locare servitutem nemo potest*.’ Usufruct, on the other hand, was counted in a person's belongings and it could be sold or let, and was therefore considered his property. There is therefore nothing here to establish that usufruct was a *merum ius*.

The view that Aristo's opinion arose through taking a common-sense view and was a matter of convenience is also open to question. The fact that usufruct was subjected to the *actio communi dividundo* proves not that it was because of convenience that it was kept back, but that it

was kept back because it was considered as property. That which was considered as property was subjected to the *actio communi dividundo*, and that which was not property was not so subjected. D.X.3.1 states 'of course the action for partition cannot be brought where there is no property held in common.' Moreover, Julian, who was in agreement with Aristo in the above law (Vatican Fragments, 68, and D.35.2.1.9) himself on the question of dividing an inheritance in (D.10.2.16.1) speaks about common *property* in usufruct. It is only servitudes which were not divisible (see D.8.4.6.1) and the *actio communi dividundo* also did not apply to servitudes (D.10.3.19.2 and 4) but a usufruct was divisible (D.7.1.5).

Roby also refers to D.35.2.1.9 and says for classical law:—

'a usufruct may be valued and divided. A servitude cannot be divided and therefore the right can be withheld by the heir, until the legatee pay him the due part of its estimated value.' (Roman Private Law, vol.-I, p. 349.)

The reason is, as we have said above, that servitude was a mere right, a mere quality, and therefore could not be divided; but usufruct could be divided because it was considered as property and not as a *merum ius*.

Professor Buckland²⁰ quotes D.41.3.35, a case where a thing in which a usufruct has been bequeathed has been stolen before the usufructuary has begun to enjoy it or before the heir has got hold of the thing; the law as there stated is that the heir could not bring an action for theft, but Sabinus' opinion is that the usufructuary could sue. Buckland says that the reason for this is because the usufruct was a *merum ius* to which the requirement of physical possession as necessary for the *actio furti* did not apply.

When, however, we examine the law of *furtum*, it will be found that this cannot be the explanation. In the first instance, nowhere in D.47.2 do we find that an *actio furti* should be given for interference with a *merum ius*. On the contrary, the law was that for *furtum*, *contrectatio*, which means handling and actual meddling with the thing, was necessary,²¹ and a *merum ius* is not an object that *can be handled*. Then, again, generally speaking the action lay for the owner, and those whose interest was less than ownership were exceptions to the rule. But when we study the law of *furtum* in its application to usufruct we see that the law relating the usufructuary's interest is identical with that which protects the interest of the *dominus*.

Moreover, when Gaius (3.200) instances those cases when a man may sometimes even steal his own property he mentions the owner stealing from a creditor or *bonâ fide* possessor, but does not include the usufructuary. He states: 'Aliquando etiam suae rei quisque furtum committit, ueluti si debitor rem quam creditori pignori dedit subtraxerit,

²⁰ *Op. cit.* p. 340.

²¹ As Buckland points out in T. B. 577.

uel si bonae fidei possessori rem meam possidenti subriperim.' Were usufruct a *merum ius* (which means something less than ownership as Professor Buckland states in this article and in his Text Book p. 577, 579) why does not Gaius include here the usufructuary as one of those who have an action against the owner? We know that the usufructuary did have an *actio furti* against the bare proprietor (D.47.2.15.1). The inference is that Gaius does not include usufructuary in 3.200 because for him usufruct was not a *merum ius*.

Again Professor Buckland writes:—

'The same idea is expressed by Paul (if it is not a gloss): "Quia nec possideri intellegitur ius incorporale nec de via quis, id est mero iure, detruditur." The words "*id est mero iure*," whatever their origin, are a useful explanation of the text in which they are imbedded. It is only because it is *merum ius* that there can be no thought of physical expulsion.'

But there is no comparison. Paul there²² is speaking about a right of way which certainly is a *merum ius* and which has no independent existence, but is merely a quality on the land. The servitude goes with the land, much in the same manner as the polish on a pair of shoes goes with the shoes. But this notion does not apply to usufruct.

In the preceding passages²³ we have shown that there was a difference between usufruct and servitude. Usufruct was a part of the ownership and servitudes were not. For this reason Gaius²⁴ divides *res incorporales* into two groups. The first group consists of inheritance, usufruct and obligations, which are aggregate rights containing corporeal things. The second group consists of all kinds of servitudes, which do not contain corporeal things and are attached to property.

Buckland states:²⁵ 'Both Gaius and Justinian after him speak of obligations as *res incorporales*, but elsewhere they sharply distinguish them, and in fact most texts do not so include them.' One of his references in note 5 is to Digest 8.1.14. pr. There we read: 'Paulus: Servitutes praediorum rusticorum etiamsi corporibus accedunt, incorporales tamen sunt, et ideo usu non capiuntur.' In this passage Paul was concerned only with praedial servitudes: there was no need at all for him to refer to obligations, and no conclusion can be drawn from the fact that he did not digress to mention them. It could just as well have been said, that since inheritance and usufruct are not included in this same passage, they too are not *res incorporales*. The proper answer is that, as pointed out above, there are two groups of *res incorporales*. In this passage, Paul speaks only about the *res incorporales* of the second group, namely, those which do not contain corporeal things.

There are many other passages which go to support the submissions herein advanced, in particular some concerned with liability under the

²² D.41.3.4.26.

²⁴ G.2.14.

²³ *Supra*, p. 160.

²⁵ Text Book, p. 186.

lex Aquilia, but space does not permit further discussion and they must be dealt with in a future article. Enough has however been said to warrant the conclusion that the conception of usufruct held by the Roman jurists whether in the classical period or later, even as late as Justinian,²⁶ was not that it was a *merum ius*, whatever else they may have considered it to be. The purpose of the present article is to clear the ground for a discussion of what the Roman lawyers at different periods really did think was the nature of usufruct. On this matter the present writer will make some submissions in due course.

²⁶ Apart from the fact that there is no reference to usufruct as a *merum ius* in the Corpus Juris there is, on the contrary, to be found a text which shows vividly that it could not have been considered as a *merum ius*. The text is Inst.2.4.4. 'cum autem finitus fuerit usus fructus, reveritur scilicet ad proprietatem et ex eo tempore nudae proprietatis dominus incipit plenam habere in re potestatem.'

A LAWYER'S 'ALICE'

GLANVILLE L. WILLIAMS

[When C. L. Dodgson wrote Alice's Adventures in Wonderland and Through the Looking Glass, he amused himself by putting into the mouths of his characters oblique references to propositions of logic, philosophy and mathematics. How would these characters have talked if instead of being a philosopher and mathematician Dodgson had been a lawyer? The following is offered as a lawyer's parody, somewhat compressed, of the earlier of the two masterpieces.]

The story begins at the point where Alice, having fallen down the rabbit-hole in chase of the White Rabbit, found herself 'in a long, low hall, which was lit up by a row of lamps hanging from the roof.']

THE hall was full of little creatures of all sorts. There was a Mouse, a Duck, a Dodo, a Lory, an Eaglet, and a jet-black Rook wearing a clerical collar.

"I," said the Rook,

"With my little book"—

murmured Alice to herself.

In the corner was a green Lizard. She was dressed in satin and orange-blossom, and was sitting on a pile of furniture. Next to Alice there was a Tortoise, about the size of a dinner-plate, standing on his hind legs and craning his skinny neck to see all that was going on. Alice noticed that he could keep in this position only by leaning against the wall; otherwise his heavy shell would have pulled him over backwards.

'Hullo,' said the Tortoise to Alice. 'You are the only human here. Are you clever?'

'Not very,' said Alice modestly.

'I'll test you,' suggested the Tortoise. 'What's the difference between a duck-pond and a reservoir?'

'I love riddles,' said Alice. 'Let me think.'

'This isn't a riddle,' said the Tortoise. 'It's a serious question.'

'Then the answer is easy. A duck-pond is small and a reservoir is big.'

'How many gallons are there in "small," and how many in "big"?' demanded the Tortoise.

Alice had to confess that she did not know.

'Then,' said the Tortoise with a satisfied air, 'you don't know the difference between a duck-pond and a reservoir.'

'Anyway,' replied Alice, 'I'm sure the difference is not important.'

'It's very important,' said the Tortoise in a determined tone of voice.

At that moment Alice's attention was distracted by the entry of a fluffy white figure. It was the White Rabbit, and a hum of conversation broke out from the gathering as he entered. He was dressed in immaculate morning dress, with a white camellia in the buttonhole, and immediately went up to where the little Lizard was sitting.

Alice suddenly realised the reason for the whole proceeding. The White Rabbit was to be married to the Lizard. That was why he had been so agitated about the time. 'Of course,' Alice said aloud to herself when she made this discovery.

'My dear, then I am so happy,' said the Tortoise.

'Happy about what?' asked Alice.

'Happy that you will marry me,' said the Tortoise.

'I will do nothing of the kind,' replied Alice with dignity.

'But you just said so. I asked you to marry me and you replied "Of course."'

'I didn't hear you asking me to marry you, and I was talking to myself.'

'Oh, oh,' cried the Tortoise, weeping bitterly. 'I didn't know that. You couldn't expect me to.' He sighed gustily, and looked up at Alice with a face all smeary with tears.

'Still,' he added, brightening, 'you have promised to marry me, you know.'

'I have done nothing of the sort,' said Alice.

'Yes you have,' replied the Tortoise. 'I thought you promised, therefore you did promise.'

'How could I make you a promise,' asked Alice, 'when I was not speaking to you?'

'Anyway,' said the Tortoise, 'promise or not, I thought you were promising, and it was quite natural that I should think so. So you really ought to marry me.'

Alice had never before considered marrying a Tortoise, but she had once kept one in her garden and had thought it quite a nice creature. She did not feel at all certain what was the right thing to do in the circumstances, but the easiest thing seemed to be to do as the Tortoise wanted, and to see what would happen. Accordingly she replied, 'Oh, all right,' which made the Tortoise look contented.

Further conversation was interrupted by the fact that the ceremony of marriage between the White Rabbit and the Lizard was beginning. Alice listened attentively. The ceremony was the same as one that she had been to when her sister was married, until the place where the bridegroom said 'With all my worldly goods I thee endow.' At that point, as Alice said afterwards, such a commotion occurred as she had never seen in all her life. The guests pulled all the bride's belongings from the corner and placed them at the bridegroom's feet. This made the marriage service into a very disorderly affair. Alice turned to ask the Tortoise why, when the bridegroom said that he was endowing the

bride, the company, so far from helping him to do this, appeared to endow *him* with all his wife's things; but the Tortoise seemed to have disappeared. By her side, instead, was a Turtle. Alice could see that it was a Turtle because it had flippers instead of feet; its shell, too, was different from that of the Tortoise to whom she was betrothed. To Alice's surprise, however, the Turtle addressed her in the voice of the Tortoise and said: 'Come along, my dear, now it's our turn.'

'You are not the Tortoise,' said Alice, somewhat doubtfully though, for she was beginning to be used to strange things happening.'

'Yes I am,' said the Turtle. 'In my excitement when the Lizard's furniture was being collected I walked away from the wall and fell over backwards.'

'But why are you a Turtle now?' asked Alice.

'I turned Turtle,' was the reply.

'Anyway,' said Alice, 'this settles the marriage question. 'I was engaged to marry a Tortoise, and nobody can expect me to marry a Turtle, whatever you may say.'

'I'm not so sure of that,' answered the Turtle (as we must now call him). 'You were engaged to marry *me*. It's the same *me*, even though I was a Tortoise and am now a Turtle.'

'I don't know what you mean by saying that it's the same you,' objected Alice 'when everything about you is different. Why, even your voice has been growing more watery—in fact more like a Turtle's—with every word.' (Before she came to Wonderland Alice would not have known what the voice of a Turtle sounded like, but now she seemed to know quite well.)

'Everything about me isn't different,' said the Turtle. 'My memory is left. I still remember what I did as a Tortoise.'

'What I mean is,' said Alice, 'that everything that I can see about you is different. I don't care about what you have in your memory.'

'You miss the point,' said the Turtle. 'My memory *proves my continued identity*. A tadpole doesn't change his identity when he becomes a frog. Why not? Because he still remembers his young days as a tadpole.'

'You miss the point,' replied Alice with determination, 'or at least half of it. You think that because you are the same person, I have to marry you. But even if you are the same person, I don't see why I should marry you. When I was engaged to you, you were a Tortoise. Now you are a Turtle. I don't like Turtles as well as Tortoises.'

'Ah,' said the Turtle. 'But if my *identity* is the same, any change in me that has happened is only a change in *attributes*. Now surely you are not going to break off your engagement to me just because of a change in my attributes. Suppose'—here the Turtle stopped to consider—'Suppose I had been rich but became poor, or suppose I had been well but became ill—would you then have refused to marry me?'

Alice did not quite know what to reply to this, and the Turtle immediately pressed home his advantage. 'If you didn't want to marry a Turtle,' he said in a grave voice, 'you should have put it into the terms of our engagement that I was not to turn into one. After all, *anybody* might turn Turtle. It's quite a common thing.' The Turtle evidently regarded this as clinching the matter, for he took Alice's arm and led her to the Reverend Rook. Rather than involve herself in a further argument Alice submitted, and she and the Turtle were duly married. As Alice had no property, except her clothes, her wedding was a much more orderly affair than the previous one.

After the ceremony a curious thing happened. Into the room came a large Frog, dressed in the livery of a footman. He hopped over to one or two people and appeared to ask them some questions, which they answered by pointing towards Alice. The Frog then hopped towards Alice, made a deep bow and presented her with a beautiful casket, croaking as he did so: 'Accept this casket on the occasion of your wedding, with His Majesty's compliments and best wishes for Many Happy Returns of the Day.' Without a word more he turned round and departed.

'What favour to show to the wife of a mere house-remover,' commented the Turtle.

'Is that what you are?' asked Alice, trying to undo the casket. 'I hope you don't call that shell of yours a house. I want a proper house.'

'I have one,' said the Turtle. 'It's called "Lobster-pots," and it's along this way. Follow me.'

Alice followed the Turtle through a door and down a passage, eventually managing to get the casket open as she walked. To her joy it was packed full of sweets.

'I wish you had something to endow *me* with,' said the Turtle with a sigh, throwing a meaning look towards the casket of sweets.

'Oh, here you are then,' said Alice, giving him the casket; 'you can have it, only I want those marzipans on top.'

'You contradict yourself,' said the Turtle, carefully putting the casket under one flipper.

Alice looked at him in surprise.

'First you say that I can have the casket,' said the Turtle. 'That means the whole casket, doesn't it?—including all the sweets in it. So, having given me the whole casket and all the sweets, you go on to contradict yourself by saying that I shall not have some of the sweets.'

'I don't see that that is a contradiction,' said Alice.

'But it is,' replied the Turtle. 'And it puzzles me so much that all I can do is to accept your opening words, which I understood perfectly, and put aside your later words as repugnant to them. This means that I am to have the casket and *all* the sweets.'

'You are a horrid husband,' said poor Alice, bursting into tears. 'You are very greedy, and you dispute everything I say.'

'I never dispute anything,' retorted the Turtle. 'I simply fail to agree. A failure to agree is not a dispute.'¹

'What is a dispute,' asked Alice, recovering her composure, 'if it isn't a failure to agree?'

But the Turtle had his mouth too full of liquorice bootlaces to answer. They were passing a chair at that moment, and he sat down on it, without offering it first to Alice. Alice walked indignantly on.

* * * * *

Alice seemed to have walked a long way down the corridor when she came to a door marked 'Lobster-pots.' She turned the knob and went in. A neat little room met her gaze, with a bright fire and a kettle boiling on the hob. Alice was tired and thirsty, and so she started to make herself a cup of tea. She had hardly finished drinking it when there was a knock at the door. It was the Frog, who again with a deep bow gave Alice a card. On one side was inscribed, 'To Lady Rabbit, "Lobster-pots."' On the other was a crown and an invitation to a royal Garden Party.

'Whatever has happened?' asked Alice. 'This is "Lobster-pots" but I am not Lady Rabbit. I am Mrs. Turtle.'

'Oh dear,' said the Frog in his funny croaky voice. He pondered for a moment and then said: 'When I asked in the wedding-hall for the bride, they pointed you out to me. The casket I gave you was meant for Lady Rabbit. And afterwards I told his Majesty that you were married to Sir White Rabbit, and he directed me to bring you this invitation. Whatever will his Majesty say?' So saying, the Frog jumped excitedly for the door and disappeared down the passage.

Alice did not quite know what to do. The Frog had left the invitation with her, and the best thing seemed to be to give it back to him, or at least to find out what she was to do with it. So off Alice ran, as hard as she could, down the passage the way the Frog had gone.

The passage came to an end and gave place to a wood. Alice had been running through this wood for some time before she realised that her chances of finding the Frog were small indeed. Breathless, she came to a stop by the side of a large mushroom, on the top of which was an equally large blue Caterpillar. The Caterpillar was sitting with its arms folded, quietly smoking a long hookah, and taking not the smallest notice of Alice or of anything else.

'Could you tell me, please,' said Alice timidly, 'the way to go from here?'

'That depends where you want to go,' said the Caterpillar in a languid voice.

'I want to go to the Lizard's—Lady Rabbit's, I mean,' said Alice, 'or else I want to go to the Royal Palace.'

¹ [1934] 2 K. B. at p. 22.

'Better make up your mind,' said the Caterpillar. 'You can't go to two places at once.'

'I know,' said Alice desperately, 'but you see, I'm very puzzled and hardly know what to do. I've just had a card from the King containing an invitation to a Garden Party. But the invitation is addressed to Lady Rabbit, while I am Mrs. Turtle.'

'Then it isn't for you,' said the Caterpillar.

'I know,' said Alice again, '— though it *was* addressed to my house.'

'That doesn't matter,' replied the Caterpillar. 'If it had been addressed to "Conrad Caterpillar" at *your* house it wouldn't have been for you, would it? It would have been for me at the wrong address.'

'I know that. There is one other thing, though. I happen to know that the King thought that *I* had married the White Rabbit.'

'Ah!' said the Caterpillar, taking a deep pull at his hookah, with evident interest.

'But you don't think that makes any difference, do you?' asked Alice. (Secretly she wanted very much to go to the Garden Party, and wished so hard that somehow the invitation might turn out to be for her.) 'Surely it is the Lizard who is invited, not me.'

'That depends,' said the Caterpillar slowly, 'on which of you the King meant to invite. If he meant to invite you, you go; if he meant to invite the Lizard, she goes.'

'Yes,' said Alice. 'And can you tell me, please, which of us you think the King did intend to invite?'

'You,' said the Caterpillar.

Alice looked doubtful, and said 'Do you think so? My husband the Turtle is only a house-remover, or so he says, and I'm sure the King would never really have meant to invite a house-remover's wife to his party. I am sure he really meant to invite the wife of the White Rabbit, who is a Knight or something.'

'"*Really meant*" fiddlesticks,' replied the Caterpillar. 'The question is whom the King *meant to invite*, not *whom he would have meant to invite if he had been properly informed*. Keep to that, and don't use the phrase "*really meant*," because it muddles things. Now the King clearly *meant to invite you*.'

Alice thought that the Caterpillar was being rather overbearing. 'It isn't clear to me,' she said.

'His mistake was not as to who you are but as to your name and as to what you had done.'

Alice felt that this remark made things worse.

'Come now,' said the Caterpillar. 'The King knows that you are a little girl, not a lizard, doesn't he?'

'I suppose the footman told him so,' replied Alice.

'And when he wrote out the invitation he pictured you, the little girl, as receiving it?'

'Yes,' replied Alice.

'And he thought that you, the little girl, had married the White Rabbit?'

'Yes,' replied Alice.

'Then that explains why he called you "Lady Rabbit" doesn't it?' demanded the Caterpillar. 'That was a mistake as to your name and as to what you had done (that is to say, as to the person you had married), but not as to *you*.'

'I suppose you are right,' said Alice, who was quite ready to accept the Caterpillar's conclusion though somewhat mystified as to the means by which he had arrived at it. 'I am very much obliged to you.'

'Don't mention it,' said the Caterpillar. 'We caterpillars are very interested in your type of problem. We call it the Problem of Identity and Attribute, of which you may have heard.' (Alice murmured that she had met it already.) 'In fact, we have a song about it.' So saying, the Caterpillar commenced to sing, in a fluty voice:

'When I become a Butterfly,
Am I then no longer I?
Or have I only changed my suit
(In other words, my attribute)?'

'You caterpillars,' said a squeaky female voice, 'spend altogether too much time puzzling about that problem. It's all a matter of words. And anyway you have given this little girl the wrong answer to her question.'

Alice suddenly saw that a great Bluebottle had settled on the mushroom by the side of the Caterpillar. The Caterpillar was eyeing the Bluebottle angrily.

'The little girl is quite right,' continued the Bluebottle, unperturbed. 'The King meant to invite Lady Rabbit, and she is not Lady Rabbit. His Majesty has really muddled up two different people, and you have to consider which of them he would have invited had he known the truth. Obviously he would not have invited a common person like the wife of a Turtle.'²

'I'm *not* a common person,' retorted Alice indignantly; 'and I don't care what you say: I am going to the party. I have quite made up my mind. Could you tell me, please' (turning to the Caterpillar), 'in which direction the Palace is?'

'East-North-East,' replied the Caterpillar briefly.

'Oh dear,' said Alice; 'but I have no compass. Could you possibly tell me, please, which path to take?'

'You try my patience,' grumbled the Caterpillar, who appeared to

² The answer given to Alice's question by the Caterpillar is analogous to the decision in *Phillips v. Brooks* [1919] 2 K. B. 243, in that it regards the King's offer as made to the person whose *bodily* attributes were in the King's mind. The Bluebottle's answer rejects this test and holds that the offer is not made to one who does not possess the attributes regarded by the King as *material*. It is submitted that the Bluebottle's view is the better one.

have been thoroughly upset by the Bluebottle's remarks. He looped down from the mushroom and began to disappear into the grass, saying as he went: 'Go along that path and do a zig-zag walk, beginning left.'

Left alone (for the Bluebottle, too, had flown away), the only thing for Alice to do seemed to be to take the path the Caterpillar had indicated to her. Alice had not a very clear idea of what a zig-zag walk was, but she believed that she had once heard of town-dwellers taking one when they wanted to go for a walk in the town without knowing beforehand where they would get to. You took the first turning on (say) the left, then the first on the right, then the first on the left again, and so on till you were tired. As Alice took her first left-hand turning she hoped that the Caterpillar was right in supposing that this complicated method would get her to the Palace.

* * * * *

It had grown very dark, and Alice was beginning to fear that she might be lost all night in the wood, when suddenly, to her joy, she heard a clock striking. On going in its direction she saw a faint glimmer, which proceeded from a night-light in the front window of a house.

Alice knocked timidly at the door. There was no answer, so she knocked louder.

Something stirred in the room with the night-light, and a sleepy voice said, 'Come in.'

Alice entered, and suddenly became conscious of the fact that the clock in the room was still striking. Its hands were at twelve, from which (as Alice later discovered) they did not move, and the clock struck twelve continuously, with only a small lengthened period between each set of notes.

There were three beds in the room. In one was a little man wearing a large top hat. In another was a big brown hare. In a third, much smaller bed, was a dormouse.

'Who are you, if you please?' asked Alice with great interest.

'I am the Hatter,' said the little man. 'This is the March Hare, and this the Dormouse. We are all mad.'

'But you are not lunatics?' asked Alice, a little nervously.

'Shhh. Don't use that word,' said the Hatter, 'or you will be put in prison.'³ So saying he climbed out of bed, crossed to the clock, and carefully wound up the striking mechanism. Alice noticed that he did not wind up the clock itself.

'Why don't you keep the clock going?' she asked.

'Saves the trouble of winding it,' was the reply.

'But if the clock doesn't go, it is never right,' said Alice.

³ In support of the Mad Hatter, it may be pointed out that the Mental Treatment Act, 1930, s. 20 (5), forbids the use of the term 'lunatic,' and it is a long-settled rule of the common law that an indictment lies against a person for doing what is prohibited by statute, if no particular mode of punishment be directed (*Hollingsworth's Case* (1620) Cro. Jac. 577.)

'It is right twice a day,' said the Hatter.

'And that's more than most people's clocks are, I'll warrant,' said the Hare, entering the conversation. 'Most people's clocks are always a *little* wrong; ours is dead right twice a day.'

Alice thought over this remark and then said: 'But you don't know when it *is* right.'

'We don't need to,' replied the Hare. 'We treat it as midnight all the time.'

'Whatever for?' asked Alice.

'Because,' said the Hatter with an important air, 'we disregard fractions of a day.'

Before she fell down the rabbit-hole this remark would have left Alice not knowing what to say. But her wits had been sharpened by all the puzzling people she had met, and so she was able to reply: 'That isn't a reason.'

'No,' said the Hatter, 'but it's a rule.'

'It's silly to follow a rule,' said Alice, 'unless the rule has a reason.'

'If you started going into reasons for rules,' said the Hatter, 'you would never get people to agree upon the reasons for the rules they follow, and they might even give up following the rules. But if you keep them to *rules*, and don't bother about the reasons, they obey the rules without thinking.'

'Take the rules you obey, for instance,' said the March Hare. 'Why do you travel on the left side of the road?'

Alice thought carefully. 'I believe it's because in the old days people liked to ride with their sword arm outside,' she ventured.

'People don't carry swords now,' replied the March Hare, 'so that's not a reason. At the present day you have a choice of sides. Now if Englishmen were sensible they would travel on the right-hand side, as they do everywhere except in England, for then foreigners would not be muddled when they come to England, and English people would not be muddled when they go abroad.'

Alice had not time to think out an answer to this before the Hatter said to her: 'Do you know that you mustn't trespass on fields marked "Trespassers will be prosecuted"?''

'Of course,' said Alice.

'Then what is the reason for that rule, if you don't do any harm to the field by walking across it?'

'I obey that rule,' said Alice promptly 'because I am afraid that the owner will prosecute me if I don't.'

'That isn't a reason for the *rule*,' said the Hatter. 'That is only a reason why you obey the rule.'

'Well, then,' said Alice, 'the reason for the rule is that the field is *his* field—I mean is *his* property.'

'What do you mean, "*his*"?' demanded the Hatter.

'I mean—oh well, I mean that he can keep me off it.'

'Then you haven't given a reason,' said the Hatter triumphantly. After a moment he added: 'This is one of my lucid intervals.'

'You are not very lucid,' said Alice (who was anxious to get back to the subject with which they had all started), 'if you pretend that it is midnight all the time. Does that mean that you stay in bed all day?'

'Certainly,' replied the Hatter. 'That's the reason why we stop the clock at midnight. If we'd wanted to have tea all day, we should have stopped it at tea time.'

'You can do anything with clocks,' said the Dormouse, waking up for the first time. 'If you want to get up an hour earlier and go to bed an hour earlier, or to get up an hour later and go to bed an hour later, the easiest way to do it is to alter the clock. So if you want to stay in bed all day, the easiest way to do it is to stop the clock altogether.' Saying which, the Dormouse again fell asleep, and was soon joined in his slumbers by the Hatter and the Hare.

* * * * *

Alice crept quietly out of the house. The sun had now risen, and Alice was able to find the path again quite easily. Her only difficulty was that she had forgotten whether her last turn had been to the left or the right. She therefore felt rather anxious when she approached the next cross-paths, for she did not know whether to zig or to zag (these were names that Alice had now invented for turning to the left and to the right respectively). However, her doubts were set at rest when she arrived at the cross-paths, for at the end of the path leading to the right Alice saw a beautiful garden, which, being an intelligent little girl, she rightly supposed to be the garden of the Royal Palace.

As she neared the garden Alice became aware of a large crowd of distinguished-looking people, in the middle of whom were the King, Queen and Knave. The Knave was attracting much attention by showing off his new wristlet watch. The watch told the day of the month as well as the time of the day.

'I am tired of it,' said the Knave. 'Will anyone offer me sixpence for it?'

There was a moment's astonished silence, and then a courtier spoke up and said, 'Yes, your Highness, I will.'

'Then,' said the Knave, 'I reject your offer.' He paused to look round the bewildered gathering, and then said: 'You should be ashamed of yourself, to offer such a contemptuous figure for my watch.'

The Queen, who had heard only the last sentence of this conversation, here interrupted and said in a bad-tempered voice: 'Who is this person who insults my son? Off with his head.' She then glared fiercely at the unfortunate courtier.

At this point Alice noted with surprise that they were all playing-cards—King, Queen, Knave, courtiers and all. However, they were evidently alive, and she therefore began to feel very worried for the courtier.

The situation was saved by the Queen seeing Alice, which distracted her attention from the courtier. 'Come here, child,' she said to Alice. 'What is your name?'

'Alice, if you please, your Majesty.'

'Oh, yes,' said the Queen. 'You married Sir White Rabbit.'

'Please, your Majesty, it wasn't me,' Alice began, but the Queen said severely: 'Don't contradict. How old are you?'

'Why, I had quite forgotten,' said Alice. 'It's my birthday. I am ten years old to-day.'

'Now you're telling falsehoods,' rasped the Queen, becoming very cross. 'If it's your birthday to-day you were ten years old yesterday.⁴ Off with her head!'

'My dear,' interposed the King mildly, 'do calm yourself.'

'Do you address me as my sovereign or my husband?' demanded the Queen.

The King looked a little uncertain, and then said: 'As both. The law draws no distinction between my public and private capacities.'

'But I do,' said the Queen. 'Where's that executioner?'

As Alice explained afterwards to her sister, she was again beginning to feel just a little bit afraid, this time on her own account, when a voice by her side whispered: 'Don't worry, my dear.' It was the Ten of Hearts. 'The executions she orders never get carried out, you know.'

'I'm so glad,' said Alice. 'But doesn't the executioner obey the Queen?'

'Bless your heart, no,' said Ten. 'You've been reading fairy stories. Queens are of no account in real life. They are only Kings' wives—nothing more. Can't order anything.'

Alice was about to ask Ten to explain about Queen Victoria when a great commotion started. The Queen had transferred her attention back to the poor courtier, and had ordered the executioner to chop off his head. When the executioner took no notice, the Queen rushed forward, seized his axe, and flung it at the courtier. At least, she meant to fling it at the courtier, but her aim was bad and actually the axe hit the King, and took his head clean off.

Alice stood aghast, fully expecting to see the King drop down dead. Instead, the old gentleman simply picked up his head and replaced it on his own neck, appearing none the worse for the mishap, though very discomfited.

'However could he do that?' Alice ventured to ask a sharp-chinned lady standing by her, whom she supposed from her dress to be a Duchess.

'He is the King,' replied the Duchess. 'The King never dies.'

Further conversation was again drowned by the King letting out a great roar of wrath, having just come to the conclusion that the courtier

⁴ For this peculiar rule and its still more peculiar reason, see 17 Halsbury (Hailsham ed.) 582—583.

nearest him had tried to assassinate him. 'The scoundrel,' he cried. 'Where's my executioner? Off with his head.'

'Off with his head,' echoed the Queen.

This alarmed Alice again, because although she now knew that the Queen's threats were disregarded, the command of the King seemed to need more respect. However, nobody moved.

'Will they disobey him, too?' Alice asked the Duchess.

'Will who disobey him?' asked the Duchess.

'Why, his servants,' answered Alice—'the executioner and so on.'

'The King hasn't got any servants,' said the Duchess. 'Not now. He did have servants a moment ago, but all his servants are regarded as dismissed on his death.'

'You just said the King didn't die,' said Alice reprovingly. 'Come now, which do you mean, that the King did die or that he didn't?'

'He must have died,' said the Duchess, 'because his head was chopped off. All Kings die when their heads are chopped off.'

Alice had to admit that, if the history-books were to be believed, this was true. But she could not help remarking to herself what curious folk they were in this Wonderland, for they said one thing and almost immediately contradicted themselves without even seeming to see that there was a contradiction.

'Anyway,' said Alice, coming back to the thought of the ferocious King with renewed fear, 'it won't be long before the King remembers to appoint the executioner over again, and then his order will be carried out.'

'Don't worry,' said the Duchess. 'His order won't be carried out. In this country we have adopted the Theory of Separation of Powers.'

'What is that?' asked Alice.

'Why, it means, for one thing, that the King has only Executive Powers, that is, powers to carry out the law. He cannot make new laws or judge people. The power to make new laws is called the Legislative Power and is given to Parliament. The power to judge people is called the Judicial Power and is given to the Judges. We do not let the King exercise the powers of Parliament or of the Judges.'

'Why not?' asked Alice, who had never before heard that there was anything that a King could not do.

'Because if he exercised all three powers the result would be Anarchy.' The Duchess looked a little unhappy about this last word, and added: 'Anyway, the result would be terrible.'

'How would it be terrible?' demanded Alice.

'Why, if the King exercised all three Powers he could make a law, decide that you had broken it, and order your head to be chopped off as a punishment—all in one breath. In fact that is what the King, bless him, tries to do sometimes, but luckily, thanks to our Doctrine of Separation of Powers, nobody takes any notice of him. Many precious heads are saved in consequence.'

'I see,' said Alice, relieved. 'So the only persons who can order me to be beheaded are the Judges, and they are not allowed to make any new law?'

'That's right,' said the Duchess.

'It's a great comfort to know it,' said Alice. Just at that moment up came a man in a full-bottomed wig, whom Alice guessed to be the Lord Chancellor. The Duchess tried to introduce him to Alice, but found that she did not know Alice's name.

'I suppose,' said Alice, 'I ought to tell you that my name is Mrs. Turtle, although I haven't seen my husband since the wedding.' Alice then recounted the tale of the casket of sweets.

'The greedy villain,' commented the Lord Chancellor when she had finished. 'You must have a divorce at once. He is not a worthy husband for you.'

'I'm sure I should like a divorce,' said Alice. 'Can the King do it for me?'

'What have I just been telling you about the King?' demanded the Duchess. 'The King is only allowed to exercise Executive Power. Divorcing people is not an Executive Power.'

'Then what is it?' asked Alice.

'In the old days,' explained the Lord Chancellor, 'you could only get a divorce from Parliament, and indeed you can still get it from Parliament if you like. But you can now get it from the Judges as well.'

'This is muddling,' said Alice. 'I thought the Duchess said that the Judges could only exercise the Judicial Power.'

'Quite right,' said the Chancellor, nodding his head vigorously. The Duchess by this time had lost interest in the conversation and had wandered off.

'Well,' said Alice, 'if Parliament gives divorces, that must be because giving divorces is a Legislative Power.'

'So it is,' said the Lord Chancellor.

'So when the Judges give divorces they are exercising a Legislative Power,' said Alice, feeling sure that she had caught the Lord Chancellor this time.

'Not at all,' replied the Lord Chancellor. 'When the Judges give divorces, *the power to give divorces becomes a Judicial Power*. Don't you see?'

'How does it become a Judicial Power?' asked Alice.

'Because the Judge exercises it, of course. If a Judge does a thing, it is bound to be a Judicial Power. Judge—Judicial, you know. Same word.'

'Then,' said Alice slowly, 'everything the Judges are allowed to do, whatever it may be, is called a Judicial Power?'

'Quite right,' said the Lord Chancellor, pleased that Alice was making such progress.

'And,' persisted Alice, 'everything Parliament is allowed to do is called a Legislative Power?'

'Quite right.'

'And everything the King is allowed to do is called an Executive Power?'

'Quite right.'

'But I thought that the Duchess said that if the King were allowed to exercise Legislative or Judicial Powers there would be terrible results.'

'Terrible,' said the Lord Chancellor.

'But the King never *could* exercise Legislative or Judicial Powers,' said Alice. 'For if you gave these Powers to him, you would not call them Legislative and Judicial Powers any more; you would call them Executive Powers.'

Alice was listening with interest to hear what the Lord Chancellor would reply to this when suddenly she had a sensation as of falling upwards. She realised that she was falling up the rabbit-hole. The next thing that she knew, she was at the top, lying on the bank with her head on her sister's lap.

'Wake up, Alice dear,' said her sister. 'Why, what a long sleep you've had!'

'Oh, I've had such a curious dream!' said Alice, and she told her sister, as well as she could remember them, all these strange Adventures of hers that you have just been reading about.

‘ TO A AND HIS ISSUE ’: THE LAW OF PROPERTY ACT, 1925,
SECTION 130 (2)

S. J. BAILEY; WITH A NOTE BY J. H. C. MORRIS

‘ Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.’

BEFORE 1926, entailed interests could exist in real property but were impossible in personal property. In order to create an entailed interest in real property, strict words of limitation (e.g., ‘ intail ’ or ‘ and the heirs of his body ’) were essential except in the case of gifts by will. In a will, certain informal phrases, such as ‘ and his issue,’ were sufficient. This situation was altered by section 130 of the Law of Property Act, 1925, whereby (a) even personal property may now be entailed, (b) strict words of limitation are now essential in every case.

Having enacted this change in the law, the section proceeds to define (sub-section 2) the effect which is to be given to-day to those informal expressions which would have created an entailed interest if employed in a devise of real property before 1926, but which cannot do so now. Such informal expressions ‘ *shall operate . . . in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before . . . this Act.*’

The plain meaning to be extracted from this sub-section seems to be that gifts such as ‘ to A and his issue ’ (which in olden days created an estate tail if employed in a devise of realty) are now to be governed by the rules which, before 1926, governed like gifts of personal property. It therefore seemed desirable to me, some ten years ago, to ascertain precisely what these pre-1926 rules were, in order that the true operation of this somewhat formidable enactment might be known. My results were stated in an article which appeared in the Cambridge Law Journal for 1936 (6 C. L. J., 67—82). Mr. R. E. Megarry now ‘ launches a frontal attack ’ upon them (*ante*, pp. 46—55). He contends, if I understand him aright, that, although my statement of the pre-1926 rules for personalty is acceptable, I am wrong in asserting that sub-section 2 of section 130 requires them to be applied to-day.¹

¹ Mr. Megarry also controverts (at pp. 53—54) some suggestions I made as to the possible significance of the word ‘ therein ’ in the sub-section, and I agree that his interpretation of the word is to be preferred. It has no direct bearing, I think, upon the present discussion.

These pre-1926 rules, so far as they concerned a gift of personalty 'to A and his issue,' were approximately as follows:—

- (i) A bequest 'to A and his issue' ordinarily carried the property to A and his issue (living at the testator's death) as joint owners.
- (ii) With slight assistance from the context, an intention might be found that the issue were to take as owners in common with A, or in remainder after his death.²
- (iii) Only where there was a strong context compelling the conclusion that the testator wished to confer upon A an *inheritable* interest (an impossibility in personalty before 1926) did the bequest operate merely as an absolute gift to A alone.
- (iv) The above rules for bequests of personalty applied equally to gifts *inter vivos*, whether of personalty or of realty, except that rule (iii) was inapplicable.

Mr. Megarry seeks to prove that modern gifts 'to A and his issue,' within the ambit of section 130 (2), invariably carry to A the sole absolute (or fee simple) interest. This is a hard task.

First he is faced with those words of the statute which direct that such expressions 'not to create absolute, fee simple or other interests'; and the significant phrase 'other interests' stands in his way. This phrase is perfectly appropriate, indeed essential, if the Act intends to perpetuate the rules which formerly applied to personal property; for, as we have seen, their result was sometimes a mere life-interest for A, with remainder to his issue as co-owners. As to Mr. Megarry, however, the Act gives to A an absolute or fee simple interest in every case: the words 'or other interests' must therefore be explained away. There is some attempt at this in a long footnote (to 51), possibly an afterthought, in which we are invited to believe that a draftsman of the Act had wished to stop at the phrase 'fee simple, or fee simple, or other interests,' and was thereby impelled to add the words 'or other interests,' and then, feeling that they went too far, must needs cut them out referring to interests in personalty. This tenuous line of supposition is not altogether easy to follow, and is perhaps inconsistent with Mr. Megarry's main thesis.³ In any case, it seems a curious unnatural method of handling the words of a statute.

Next, of course, Mr. Megarry must explain away all those operative words of the sub-section which direct that such expressions 'shall

² When the latter construction is adopted, the class of issue participating in the gift does not close until A's death.

³ It seems to me that this line of supposition places Mr. Megarry in a difficulty, since it requires one to suppose that the sub-section applies to a gift 'to A and his issue' even though the gift be found in some special context which distorts it into a *determinable interest* for A. This would seem difficult to reconcile (i) with Mr. Megarry's general thesis (see p. 53) that the sub-section invariably operates to produce an absolute interest for A, and (ii) with his contention (pp. 48—49) that the sub-section does not apply at all unless the phrase 'and his issue' appears in a context which, before 1926, would have conferred a mere entail.

create . . . interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before . . . this Act.” He makes several gallant attempts to do so. These include the footnote mentioned above wherein, besides the argument already described, we learn that ‘one explanation, of course, [of this inconvenient passage about personal property] is that this is merely another example of that tortuosity of mind which some regard as the inherent vice of modern draftsmanship.’ Mr. Megarry has other and more serious arguments which we shall examine shortly. But perhaps one may venture, at this point, to offer in the draftsman’s defence the possible explanation that he used his words advisedly and, being aware of the rules which governed personalty before 1926, desired to perpetuate them.

In the text of his article (at pp. 48—49), Mr. Megarry begins with the interesting (if somewhat unsubstantial) suggestion that the sub-section does not apply at all to a modern gift ‘to A and his issue,’ unless it appears in such a context as would have permitted an entail in a pre-1926 devise. The sub-section refers only to ‘expressions’ which, in a will operating before 1926, ‘would have created an entailed interest in freehold land’; and it is well known that, helped by a sufficiently strong context, expressions such as ‘and his issue’ were occasionally construed as words of purchase even in a devise of realty, so that A might acquire an interest in co-ownership with his issue—instead of the normal entail. It is therefore conceivable, as Mr. Megarry contends, that the sub-section is not intended to affect a modern gift ‘to A and his issue’ if it appears in a context which, before 1926, would thus have ousted its normal entailing effect.⁴ To insist upon this reading of the sub-section, however, is to force upon the Courts a burdensome and (as it seems to me) unnecessary task of investigating contexts past and present. *Ex hypothesi*, if the sub-section does not apply, the gift ‘to A and his issue’ makes A and his issue co-owners of the property. If, on the other hand, the sub-section does apply, the gift (upon my reading of the Act) again makes them co-owners, though by a different route—i.e., because this would have been the result with personalty before 1926. Accordingly, as Mr. Megarry admits (p. 49), ‘there is no practical difference in the actual result.’

Mr. Megarry’s final contention (pp. 50—53) is as follows. Even though the sub-section does enact that modern gifts ‘to A and his issue’ must now operate to confer ‘interests corresponding to those which’ those words would have carried in a pre-1926 gift of personalty, and even though a pre-1926 gift of personalty, so worded, ordinarily created co-ownership between A and A’s issue, the sub-section intends A to be sole owner.

⁴ I am not sure that Mr. Megarry is correct, at p. 49, in assuming that this possibility had escaped my attention.

If I understand his arguments aright, they are: (i) that the word 'interests' in the Act implies only that *A* himself is to have some kind of interest;⁵ (ii) that the 'expressions' with which the sub-section is concerned do not comprise the whole operative phrase 'to *A* and his issue,' but only its concluding words 'and his issue'; (iii) that the Act regards those words, and requires them to be construed, as words of limitation.

The true construction of words is so much a matter of impression that the simplest rejoinder to these arguments, perhaps, is that they do not to my own mind reflect the natural meaning of the words which the statute has used. Let us take, for example, the argument that the 'expressions' with which the sub-section is concerned comprise (in gifts 'to *A* and his issue') the words 'and his issue' only. What the sub-section says is this: certain 'expressions,' which at one time 'created' an entailed interest, shall in future 'create' certain other interests. To my mind, it is not so obvious as Mr. Megarry would have it that mere words of limitation, such as 'and his issue' can be said to have 'created' entailed interests in times past.⁶ Even, however, if we accept this contention, there is something else for Mr. Megarry to explain. The sub-section directs that these creating words are now to 'create' certain other interests—interests which, according to Mr. Megarry, are invariably a single fee simple or absolute interest for *A*. As all lawyers know, a fee simple or absolute interest is created nowadays without using any words of limitation. On Mr. Megarry's theory, therefore, although our sub-section enacts expressly that phrases such as 'and his issue' are to operate to *create interests*, its true meaning is that such phrases are mere surplusage devoid of effect.

The third stage of Mr. Megarry's final argument is that the words 'and his issue' never did operate to create an entail except where used as words of limitation; that consequently the sub-section does not apply to

⁵ This first argument receives its answer, I think, in my reply to Mr. Megarry's second and third arguments. Perhaps, however, I should add the following further observations upon it. (i) Mr. Megarry's text (e.g. p. 51, lines 6, 18) tends to use here the word '*interest*,' in preference to the plural word '*interests*' which is used by the Act. The fact that the sub-section uses the plural word 'interests' is in itself a hint that interests (in co-ownership) are a contemplated result. The sub-section enacts that expressions which formerly created '*an entailed interest*' are now to create '*absolute, fee simple or other interests*.' It does not say, as Mr. Megarry would have it, that what formerly created '*an entailed interest*' is now to create '*an absolute or fee simple or other interest*,' (ii) Mr. Megarry's argument (pp. 50—51) is that the Act only provides that the phrase 'and his issue' is to *create an interest (sic)* and does not specifically permit the phrase to indicate also who is to get that interest. From this he argues that, in construing the phrase with reference to a pre-1926 gift of personalty, one must ignore the old personalty rules in so far as they decided who got it (which, of course, is the main thing that they did decide). This is in substance an argument that 'and his issue' must be construed as mere words of limitation (which was almost impossible with personalty before 1926)—as to which, see my answer to his third argument, *post*. Surely, it is unnatural to deduce from a direction that a phrase shall 'create interests' an implication that the phrase must not indicate at the same time who are to have those interests.

⁶ Mr. Megarry (pp. 51—52) evidently felt the difficulty here: strictly speaking, mere words of limitation surely 'created' nothing; they merely denoted the size of the estate which was being created by the complete operative phrase 'to *A* and his issue.'

them unless they are used as words of limitation; and that the sub-section must therefore intend them still to operate as words of limitation.⁷ We have already noted one difficulty inherent in this line of argument; namely, that it would reduce the phrase 'and his issue' to a mere nullity, whereas the sub-section directs that it is henceforth to 'create' certain 'interests.' These 'interests,' moreover, are to correspond to those which the phrase would have created if used in a gift of personalty before the Act. And here one must not forget that, before the Act, the *prima facie* interpretation of the words 'and his issue' in a gift of personalty was not the same as in a devise of realty. With realty, there was a strong (though artificial⁸) presumption that the words were words of limitation: with personalty, however, there was an almost overwhelming presumption that the testator had used them as words of purchase, to the intent that the issue should become co-owners of the gift. From this it follows that, in the vast majority of cases wherein the words 'and his issue' were construed as words of limitation in devises of realty, they would not have been so construed had the property been personalty. The sub-section now directs that the rules for personalty are to prevail. In the face of this, the argument that the sub-section requires us now to construe 'and his issue' as words of limitation seems very like an argument that it means the reverse of what it says.

In conclusion, I must confess that these wordy arguments—both Mr. Megarry's and my own seem—to me to be unduly narrow and meticulous. We are in danger of ignoring the wider issues if our attention is concentrated overmuch upon the different shades of meaning of some word or phrase. To me the wider issue seems to be this. Before 1926, the meaning normally attributed to a gift 'to A and his issue' was that A's issue were intended to take as co-owners with (or, sometimes, after) A. With one solitary exception, this was the rule whether the gift was by will or *inter vivos* and whether it concerned real or personal property. The solitary exception—the devise of realty—was an anomaly introduced for reasons difficult to justify and probably inconsistent with the intentions of normal testators.⁹ Happily, this artificial exception has now been abolished by the Law of Property Act. In its place the Act puts either the co-ownership which has been held in all other cases to be the donor's true intention or, according to Mr. Megarry's theory, a construction which gives everything to A and ignores entirely the 'issue' whom the donor or testator has specified in the gift.¹⁰ If there is indeed room to

⁷ *Ante*, pp. 52—53. Mr. J. H. C. Morris refutes these arguments, *post*, pp. 190—191.

⁸ *Ex parte Wynck* (1854), 5 De G. M. & G. 188, *per* Turner, L.J., at p. 225.

⁹ See, e.g., 6 C. L. J. 70—72.

¹⁰ It seems to me that Mr. Megarry's arguments, pursued to their logical conclusion, would rob the issue even more extensively than he cares to admit. There are four possible kinds of gift 'to A and his issue':—(i) realty given by will (*R W*), (ii) personalty given by will (*P W*), (iii) realty given *inter vivos* (*R V*), (iv) personalty given *inter vivos* (*P V*). In all except the first case (*R W*) the normal result before 1926 was co-ownership. In *R W* the normal result was an entail—a result which is now prevented by section 130 (1). The scope of sub-section 2, however, is not confined to *R W*; it is of general application

doubt which of these alternatives the Act has prescribed, that alternative which least frustrates the donor's expressed intentions is surely to be preferred.

J. H. C. MORRIS

May I be allowed to add a few words to this interesting discussion?

(1) Mr. Megarry's principal contention¹ is that 'since the only words which come within the sub-section are words of limitation, the "similar expressions" referred to in the sub-section must also be words of limitation and so cannot be words of purchase; like must be compared with like' (p. 55). In other words, just as the expression 'to A and his issue, by which I mean his descendants *ad infinitum*,' is not a similar expression to 'to A and his issue, by which I mean those of his descendants who are now living'; so the expression 'to A and his issue' is not a similar expression to 'to A and his issue' if the word 'issue' in the first expression is a word of limitation and in the second expression is a word of purchase. This is said to be 'the heart of the matter' (p. 53).

Now even if we accept the premise, the conclusion is not so obvious as it appears, it depends of course upon what you mean by 'similar' and what you mean by 'expression.' To test this, let us consider Mr. Megarry's own examples. Mr. Megarry says that 'all my fees' (meaning fee simple estates) is not a similar expression to 'all my fees' (meaning professional earnings); that 'to A and his family' (meaning A's wife and children) is not a similar expression to 'to A and his family' (meaning A's issue); and that 'stout fellow' (meaning stalwart friend) is not a similar expression to 'stout fellow' (meaning gluttonous don). All this is obvious if 'expression' means verbal symbols plus legal or other meaning; but it is far from obvious if 'expression' means verbal symbols alone. Would it be a misuse of language for a judge to say, 'In that case a gift to A and his family was construed to mean A's wife and children, but in this case a *similar expression* must be construed to mean A's issue'? Would it be so very extraordinary if I were to say, 'When I called X a stout fellow he offered me a drink, but when I used a *similar expression* to Y he took offence'? My contention is that the 'similarity' of the expressions referred to in section 130 (2) of the Law of Property Act, 1925, refers to the verbal symbols by the testator and not to the legal meaning of those symbols. If this is so, the expression 'to A and his issue' (used as words of limitation) is a similar expression to 'to A and issue' (used as words of purchase), and therefore the expression is perfectly capable of passing the property jointly to A and his issue as purchasers, even if we accept Mr. Megarry's argument that before the

(it refers to *R W* merely in order to identify the 'expressions' with which it is concerned) —see Mr. Morris' second argument, *post*, p. 191. Mr. Megarry's theory, therefore, would seem to rob the issue even of the co-ownership which they used to get in *P W*, *R V* and *P V*.

¹ Of his other arguments, Mr. Megarry admits that one is 'somewhat verbalistic' (p. 52), and that the other may be wrong (p. 51).

sub-section can apply at all the words ‘ A and his issue ’ must have been construed as words of limitation. As Mr. Bailey has shown, this is the natural result of words used advisedly by the draftsman.

(2) It is submitted that Mr. Megarry’s contention that the sub-section only applies to words of limitation is unsound. To test this, let us suppose that our modern testator has made a bequest of *personalty* ‘ to A and his issue.’ Mr. Bailey has shown convincingly that such words have invariably been construed by modern judges as words of purchase carrying the property either to A and his issue as co-owners, or to A for life with remainder to his issue as co-owners, according to the context (6 C. L. J. 71—72). Now does the sub-section apply to such a bequest? Mr. Megarry would presumably say no, because in his view the sub-section only applies to expressions which are words of limitation, and these expressions are words of purchase. But in that case, how is it that the sub-section says that the expressions ‘ shall operate in equity in regard to property real or personal to create ’ certain interests? And how is it that Mr. Megarry omits these crucial words from his analysis of the framework of the sub-section (p. 47)? Unless the sub-section applies to bequests of *personalty*, these words are meaningless; they might just as well not have been enacted. It may be asked, why need the sub-section apply to *personalty* at all, since it does not alter the construction of the words? The answer may well be, in order to forestall arguments like Mr. Megarry’s!

It might be argued that it is theoretically possible for a testator, even in modern times, if he is explicit enough, to bequeath *personalty* to A and his issue in such a way that A takes absolutely and his issue take nothing. In such a case it would be argued that ‘ and his issue ’ are words of limitation and that therefore the fact that the sub-section obviously does apply to *personalty* does not prevent it from applying only to words of limitation. But this theoretical possibility is so remotely improbable as scarcely to be worth serious discussion. It is difficult to think of any words explicit enough for a modern judge to hold that a gift of personalty to A and his issue gives A the absolute interest and his issue nothing. Mr. Bailey has not been able to find any case more recent than 1816² in which this result has been reached. With some justification, he calls the argument ‘ amazing ’ and the result ‘ grotesque ’ (6 C. L. J. 71); and Mr. Megarry has unreservedly accepted all that Mr. Bailey says about the construction of gifts of *personalty* to A and his issue before 1926 (pp. 47, 54). Mr. Megarry’s interpretation of the sub-section forces us to reach a result which he himself agrees is grotesque, by requiring us to travel back over a hundred years in order to elucidate the meaning of modern words. The natural interpretation of the sub-section only requires us to travel back to the position immediately before 1926 and gives a surely more sensible result.

² *Lyon v. Mitchell* (1816), 1 Madd. 467.

WARRANTIES OF LAND IN THE REIGN OF RICHARD I¹

S. J. BAILEY

THE reign of Richard I offers certain advantages to those who would study the land law of that time. Glanvill's *De Legibus*² shows the law as it stood immediately before the reign began; and, five years later, the earliest surviving rolls of the *Curia Regis*³ show the King's Justices applying it. These rolls have been printed and so are easily available. They carry the story from the summer of the year 1194 to the end of the century and beyond. Unfortunately, however, they present certain difficulties. In those days, a plea of land before the King's Justices was ordinarily a lengthy matter, extended by essoins and adjournments over several terms or even years. And when one attempts to trace such a plea to its substantial hearing or to judgment one often fails. Perhaps the roll of the crucial term is missing, or the Justices have adjourned the case from Westminster into the Eyre—whereof few records survive.⁴ Perhaps the official scribe has so spelled or altered or contracted the names of the parties as to defy recognition;⁵ or the case may have ended prematurely by the death of a party or by some compromise not discoverable among the Feet of Fines.⁶ Meanwhile, moreover, one is conscious that these records of the law administered by the King's Justices tell us little or nothing of Shire Court and Court Baron, wherein much of the litigation still lay.⁷

¹ The following abbreviations are used: Glanv. (Glanvill's *De Legibus*, etc.); C. R. R. (*Curia Regis Rolls*, published by the Stationery Office); P. R. S. (Pipe Roll Society's publications); Palgrave (*Rotuli Curiae Regis*, ed. Palgrave); Plac. Abr. (*Placitorum Abbreviatio*).

² Glanvill's *De Legibus* is admittedly one of the most clear, straightforward and logical in arrangement of all the books on English Law: see the preface to Woodbine's edition, p. vii. See also Winfield, *Chief Sources of English Legal History*, 256—258.

³ For a list of the printed rolls of Richard I, see 1 C. R. R. p. viii; 7 C. R. R. p. v. The earliest (Trinity, 1194) is printed in 14 P. R. S., with an introduction and table of actions by Maitland. Others are in C. R. R. vols. 1, 7; 24 P. R. S.; and 1 Palgrave. The collection *Placitorum Abbreviatio* is sometimes helpful; but it assigns wrong regnal years or reigns to many of the pleas of this period.

⁴ The printed rolls include a few Eyre Rolls for the summer or autumn months of 1194, 1195, 1198, 1199. Of the pleas at Westminster, the more serious gaps are between Mich. 1194 and Hil. 1196, between Trin. 1196 and Easter 1198, and between Easter 1189 and Hil. 1199.

⁵ E.g., John fitz William may become John of Winchester. Isabel of Ford may become Isabel the wife of Robert, or Isabel the daughter of Roger. The description of the land may provide a clue, but this is frequently omitted or obscured by variants in spelling. The printed rolls are well indexed for names and places. Indexes of subjects are lacking or unhelpful in legal matters, apart from C. R. R.

⁶ The complete series of Feet of Fines for the reign of Richard I has been printed by P. R. S.; but only thirteen of them are earlier than October, 1194.

⁷ Glanvill omits the methods of determining pleas in Shire Court and Court Baron, on the ground that their customs are so numerous and various: Bk. 12, cc. 6, 23. Bracton, f. 329 b, will say that they ought to follow the King's Court in certain matters, such as voucher to warranty. Very occasionally the rolls of *Curia Regis* show the procedure of a local court whence a plea has been removed by *recordari facias*. And there are many records that a lord has 'prayed his court' e.g., 1 C. R. R. 86, 88, 89 (1199); see Glanv.

§ 1.—THE WARRANTIES

It seems that *express* warranties were rare when this period began. Glanvill did not mention them; he seldom even mentioned a charter.⁸ Yet those twelfth century charters which have survived show that men sometimes embodied their grants of land in charters of confirmation and that, as early as Henry II, such charters might contain a clause wherein the grantor expressly bound himself and his heirs to warrant the land against all men.⁹ In Richard's reign there are signs that this system was gradually gaining ground,¹⁰ and that for a while men suspected that even a conveyance by fine might be the stronger if it included a clause of express warranty.¹¹ In many of the earlier clauses of warranty, however, the principal emphasis is upon the grantor's liability to make *escambium* (either generally or in some particular place) if he is unable to warrant the gift.¹² This, together with the fact that the majority of conveyances contained no warranty clause at all, suggests that the law readily implied a warranty where none was expressed. In days when reading and writing were rare accomplishments and experienced clerks might not be easily available,¹³ it was obviously important that grants of land should not fail for want of a charter with clause of warranty.

Glanvill's law of *implied* warranties is not unlike that of the thirteenth century.¹⁴ As we shall see, there are hints in the cases that the rules on this subject are not always so broad and free from technicality as his readers might reasonably suppose. Unlike the voluminous Bracton of fifty years later, his treatise is short and concise. Some tendency to generalise is therefore to be expected. Nevertheless, one gains the impression that the law of implied warranty in King Richard's time was

Bk. 12, c. 7. One whose plea is removed from Court Baron to King's Court by a *pone* not preceded by the necessary *toll* will be amerced and his plea will fail: 1 Palgrave, 440 (1199); cf. 1 Palgrave, 5 (1194).

⁸ His concern is mainly with the procedure of the King's Court. Charters interest him chiefly as a method of *proof*: if vouchee comes and fails to warrant voucher, it may come to the duel between them 'whether voucher have his charter thereof or no' (Bk. 3, c. 1); an alleged villain may prove his enfranchisement by charter or by other lawful means (Bk. 5, c. 5); a loan may be secured by pledges, by gage, by interposition of faith, or by charter (Bk. 10, c. 3); a charter may be proof of a debt, and debtor must 'warrant' the charter and the agreement contained in it if he acknowledge its seal (Bk. 10, c. 12); it is a crime to falsify a charter (Bk. 14, c. 7).

⁹ *Ancient Charters prior to A.D. 1200*, 10 P. R. S. No. 45 (1171—1183): grant to an abbey in perpetual alms with clause of warranty and acquittal.

¹⁰ *Ibid.*, Nos. 56 (vifgage dated 1190), 64 (grant for fealty dated 1197—1198), 65 (grant for homage dated 1197—1198).

¹¹ In each of the last four years of Richard I, there are between two and three hundred fines. The approximate proportion containing warranty clauses is 9 per cent., 8 per cent., 11.5 per cent. and 5 per cent. respectively. There are no warranty clauses in the few fines dated before 1195 nor in those (totalling 122) dated early 1199 before Richard's death. See P. R. S. vols. 17, 20, 23, 24. Neither of Glanvill's two specimen fines contains a warranty clause: Bk. 8, cc. 2, 3.

¹² In the Feet of Fines, one warranty clause in three emphasises *escambium* in 7 and 8 Ric. I: 17 P. R. S. Nos. 27, 40, 74, 119, 125; 20 P. R. S. Nos. 21, 40, 78, 79, 89, 113. Thereafter it is seldom mentioned: 23 P. R. S. Nos. 44, 156, 183; 24 P. R. S. No. 79.

¹³ In 1198 a lord, sued by certain tenants for exacting from them villain services and for detaining and ignoring the Justiciar's writ thereof, answers that when they unrolled the writ before him he had no clerk to read it to him and that when at last a clerk arrived, they had gone: 7 C. R. R. 346.

¹⁴ See 8 Cambridge Law Journal, pp. 278 *et seq.*

simpler and more elastic than it became in the thirteenth century. The plea rolls, however, are seldom very helpful in this matter: when warranty is debated we are often left to guess whether that particular warranty was imposed by the express words of a charter or was implied by the law. The record of an action in which *B* is summoned to warrant *A*'s land will often add 'whereof *A* has *B*'s (or *B*'s father's) charter': but whether that charter contains an express warranty-clause it does not tell.¹⁵

A warranty was implied when land was granted in return for *homage* and service.¹⁶ Such grants were very frequent during this period, and the homage was often done in the presence of the King's Justices.¹⁷ The resulting bar, which precluded the grantor and his heirs from ever reclaiming the land (even by inheritance) from the grantee or his heirs,¹⁸ was already clear law.¹⁹ It seems probable that all conveyances by *fine* levied in the King's Court likewise implied a warranty²⁰—they undoubtedly operated as a bar.²¹ It was soon realised, however, that the fine did not need assistance from the law of warranty. There was already, in Glanvill's day, a writ *præcipe quod teneat finem factum in curia mea*, destined soon to become a popular remedy.²²

Little is to be found, during this period, of warranties implied from the presence of special phrases in a conveyance. No doubt such phrases as '*pro omni servito*' and '*in puram et perpetuam elemosinam*,' which were already common form in grants for a specified service and in frankalmoign respectively, raised an obligation to acquit the grantee against services demanded by an over-lord. But there is little direct evidence of this in

¹⁵ *E.g.*, 20 P. R. S. No. 39 (1196); 24 P. R. S. (1196), pp. 215, 217—218.

¹⁶ Glanv. Bk. 9, c. 4; also Bk. 7, c. 3 ('if the chief lord have warranted the homage'). Hints in the case include: 14 P. R. S. 7 (1194)—the King's letters patent that no 'man' of *A* shall be impleaded of any tenement which *A* ought to warrant to him, so long as *A* remains a hostage in Germany for the King; 1 C. R. R. 97 (1199)—*B* vouches *C* 'because' *C* gave him that land for his homage and service; also 1 Palgrave (1199) 432; also *ibid.* 305, 310, and Plac. Abr. 40, re Henry de Longo Campo. See further 8 Camb. L. J. 278—279.

¹⁷ *E.g.*, the following instances in the Feet of Fines: 17 P. R. S. Nos. 13 (1192), 24 (1195), 104 (1196); 23 P. R. S. Nos. 52 (1197), 138 (1198).

¹⁸ See 9 Camb. L. J. 88 *et seq.*

¹⁹ Glanv. Bk. 7, cc. 1, 18; Bk. 13, c. 11. Illustrations from this period are 14 P. R. S. 21 (1194); 1 Palgrave, 39—40 (1194), 353, 354 (1199) 398—399 (1199); and perhaps *ibid.* 49—50 (1194).

²⁰ *E.g.* 1 Palgrave, 70 (1194), where *A* is summoned to warrant to *B* a chirograph made between them in the King's Court as to certain land which *C* is now claiming from *B*. See further 1 Palgrave (1199) 228, 424; also 8 Camb. L. J. 280.

²¹ 1 Palgrave (1194) 30—31, 39—40; 14 P. R. S. (1194) 68—69. See further 9 Camb. L. J. 98—99. Even an infant's fine seems to be binding at this period: 1 Palgrave (1194) 2.

²² Glanvill gives this writ (Bk. 8, c. 4); for instances, see Woodbine's notes, p. 237. Woodbine indexes it as *de fine facto observando* (p. 306). Maitland calls it the writ *de fine tenendo* (2 Coll. Pap. 127). It is in the early registers of the thirteenth century (*op. cit.* 132, 137). Presumably it was this same writ which grounded Maitland's 'action *Quare non tenet ei finem factum*' (2 P. and M. 100). For an action upon a fine levied before Justices in Eyre, Glanvill has other writs whereby the parties, the Justices and Knights of the shire are summoned to court to record the matter (Bk. 8, cc. 5—8). Evidently plea rolls of the Eyre were rare or less conclusive than those of the Central Court or were likely to remain in the personal possession of the Justices. As regards Bracton's possession of the eyre rolls of Raleigh and Pateshull, see 2 Holdsworth, 232, 233; and cf. 1 Palgrave, 418—419 (1199).

our period, much less of a general duty to warrant land so granted.²³ Even the celebrated words *dedi* and *concessi*, which were to become so prominent in the thirteenth century,²⁴ are hardly noticeable as having any special technical significance. Glanvill tells us, it is true, that donors are bound to warrant their gifts to donees and their heirs—the term ‘gift,’ be it remembered, originally embraced even conveyances for value—and that a donor’s heir is similarly bound if the gift is reasonable.²⁵ There are several early pleas which hint vaguely of such a rule.²⁶ One entry, however, in the rolls for 1195, throws a very different light upon this matter.²⁷ Geoffrey of Hurton has complained to the King’s Justices that he claimed certain land by writ of right against Robert fitz Everard and that the Shire Court of Buckingham (ousting the Court Baron) heard the case but never finished it. So now, in the autumn eyre of 1195, four knights of the shire are making their detailed ‘record’ of that plea to the Itinerant Justices. To cut a long story short, their excuse (if excuse it was) was this. The defendant Robert had vouched to warranty William of Hurton, the lord of that fee, and, by producing this William’s charter of grant, had proved that William had granted that land to him. Thereupon William had admitted the charter, but had argued that he was not bound to warranty because the charter ‘contained no more than that William granted (*concessit*) that land to Robert, and there was no mention therein of his gift (*de dono suo*) nor of warranty.’ This problem, say the knights, had produced a difference of opinion in the Shire Court. They had therefore postponed judgment upon it. Then (after certain essoins) had come the *guera de Windeshor*; and so nothing further had been done. One can sympathise with the Shire Court, faced with this very technical question of law and construction. Would *concessi* without the customary *dedi* raise an implied warranty? Even the Statute of Bigamy in 1276 will not make this point really clear.²⁸ The siege of Windsor began at the end of March, 1193;²⁹ and by that time (if we may believe the four knights) the

²³ The majority of the Feet of Fines and charters of this period contain one or other of these phrases. Sometimes, however, they contain an express warranty as well: e.g., 10 P. R. S. Nos. 45, 64; 17 P. R. S. Nos. 40, 75. Contrast the position in the thirteenth century: 8 Camb. L. J. 280—281.

²⁴ See 8 Camb. L. J. 281—282, for the warranties implied from these words at common law and by the Statute of Bigamy.

²⁵ Bk. 7, c. 2. See also Bk. 3, c. 3, for a writ to summon *A* to warrant to *B* land ‘which *B* claims of his gift or of the gift of his father.’

²⁶ In 14 P. R. S. (1195), there are three cases in which defendant vouches a warrantor in respect of land which, it is said, the latter or his father ‘gave’ to defendant or his father: 125 (vouchee gave to voucher’s father), 126 (vouchee’s father gave to voucher’s father); 133 (vouchee gave to voucher).

²⁷ 14 P. R. S. 124: a few sentences of the record appear also in Plac. Abr. 80. The hearing is in the nature of a *recordari facias*. What judgment the Justices gave is not recorded.

²⁸ See footnote 24, *ante*.

²⁹ See editor’s introduction to 3 P. R. S. (N. S.), at p. xviii. The expenses of repairing the buildings around Windsor Castle, burned or broken ‘*per verram*,’ are shown in the Pipe Rolls for 1194: 5 P. R. S. (N. S.) 256. John had seized this and other castles, while King Richard was a captive in Germany, and then the King’s supporters had attacked them.

action with its various essoins and adjournments had already passed through some fifteen separate stages. In it, therefore, we have the good fortune to see something—and something surprisingly technical—of the operation of the law of warranty almost two years before the earliest of our plea rolls.

Having said that gifts of land imply a warranty, Glanvill adds in a later chapter that *sales* of land have a similar effect: the vendor and his heirs are bound to warrant the thing sold to the purchaser and to his heirs after him.³⁰ He seems to say also that similar warranties arise from gifts *in escambium*—an expression which would include an ordinary exchange of land and even, perhaps, that *escambium* which the Court would compel one's warrantor to give if he failed to protect one's seisin of the warranted land.³¹ Those who, to use a technical distinction of a later age, have a possession which does not amount to seisin, are in a different case. Glanvill does not say that they have no implied warranty. What he says is that if they are sued by a stranger, and answer that the land is not their own but has been entrusted to them by another, the stranger must get a fresh writ and sue that other instead.³² The *termor* and the *gagee* fell within this rule.³³ Yet there is evidence that each of these enjoyed a warranty.³⁴

The widow's *dower* was regarded at this time as a gift from her late husband.³⁵ Accordingly, his heir was bound to warrant it against adverse claims.³⁶ This warranty, indeed, went further than any other. Even when a widow was plaintiff, suing for her dower, she could require the heir-warrantor to assist her against whoever was seised of the land

³⁰ Bk. 10, c. 15; see also Bk. 3, c. 1.

³¹ Bk. 3, c. 1: a defendant can vouch to warranty 'if he allege that he have a warrantor, of whose gift or sale or gift *in escambium* or other cause he has that thing.' An example of *escambium* is seen in 1 C. R. R. (1196) 28—29. *A* brought novel disseisin against *B* and lost because the sheriff testified that he had put *B* in seisin in execution of a judgment that *B* should have *escambium* from *A*'s land in compensation for land which *B* had lost through *A*'s breach of warranty. For warranties arising from *escambium* in thirteenth century, see 8 Camb. L. J. 282—283.

³² Bk. 3, c. 1: 'if the tenant declares in court . . . that he merely holds it as a loan or hiring or gage or as committed to his custody or in some other mode entrusted to him by another . . .' But contrast 1 Palgrave, 19 (1194) where a defendant who had only custody was allowed to vouch to warranty him of whom she held; also 14 P. R. S. 1—2 (1194) where a mere *vicar* 'vouches' the parson in *assize utrum*.

³³ Glanvill's rule expressly includes the *gagee* (see preceding note). Its application to the *termor* is illustrated by 14 P. R. S. 133 (1195) and by 1 Palgrave, 355 (1199): in each the lessor came and acknowledged the tenancy and plaintiff (suing mortdancestor) was advised to seek a writ against him—in the latter case he did so and won: 2 Palgrave, 47 (1199).

³⁴ As to the *termor*, see 1 Palgrave, 153—154 (1198), anomalous in that *termor* vouched lessor to warranty: lessor duly warranted and won the case for him. *Gagees* could not get from the King's Court a specific performance of their debtor's obligation ('*privatas conventiones*') to deliver the promised pledge: Glanv. Bk. 10, c. 8; yet the debtor is 'bound to warrant the terms of the charter' of pledge: Glanv. Bk. 10, c. 12. For a gage, by fine, with *express* warranty, see 17 P. R. S. No. 171 (1196).

³⁵ See, e.g., Glanv. Bk. 6, cc. 1, 12. The writ to summon the heir to warrant her dower recites that she claims it 'of the gift' of her late husband: *ibid.* c. 9.

³⁶ A curious example is 14 P. R. S. 71 (1194): widow with her second husband vouch the heir and produce an infant boy as such. Plaintiff denies that this boy is heir, whereupon they 'produce a certain girl' instead.

concerned,³⁷ and could usually require him to find her compensation if her action failed. The law on this topic is already well developed in Richard's reign, and will remain substantially unaltered in the thirteenth century.³⁸

Glanvill groups with dower, in this matter, the bride's *maritagium*—the land which her father or other relative settles upon her and her heirs of the marriage.³⁹ This is well supported by the cases in so far as it implies that she and her descendants have the normal warranty if a stranger sues them for the settled land and that the donor and his heirs are barred thereby from suing them for the land.⁴⁰ But I do not recollect any clear case, in Richard's reign or thereafter, in which the donor or his heir comes into Court to assist her or her heir suing (as *plaintiff*) to recover her marriage-portion from a stranger.⁴¹ It seems likely, therefore, that this latter aspect of Glanvill's rule was a relic of the past. The duty of the bride's father, and of this heir after him, to warrant her *maritagium* was already old law when our period began.⁴² And the fact that here implied warranty was firmly established may account for the scarcity of express warranties in marriage gifts. If the charter which confirms a gift of *maritagium* adds an express warranty, it usually does so merely in order that it may proceed to specify the precise locality from which *escambium* shall come if the warranty be broken.⁴³

Throughout this period there seems to be no doubt that warranties, express or implied, extend to the *heirs* of the parties as well as to the parties themselves.⁴⁴ There is no clear indication as yet, however,

³⁷ The probable origin of this anomaly is the old rule that her action for dower fell within the jurisdiction of the heir's court baron: see Glanv. Bk. 6, cc. 4, 6; also cc. 8, 9, 10, that when such action is removed into King's Court defendant can object if heir not present to warrant her claim—e.g., 1 Palgrave, 126 (1194). There are two pleas in 1194 (*op. cit.* 80, 81) in which defendants justify this objection by saying that they are not her deceased husband's heir. See also 14 P. R. S. 7—8; 1 Palgrave, 20—21; 23 P. R. S. No. 123 (*escambium*); and twelve claims by a Cambridge dowress in 1 Palgrave, 406—409 (1199).

³⁸ For the position in the thirteenth century, see 8 Camb. L. J. 283—284.

³⁹ Bk. 7, c. 18: neither she nor the heirs of the marriage can sue without her warrantor until homage has been done by her third heir; it should not be done earlier, see 9 Camb. L. J. 88—97 and cf. 1 Palgrave, 39—40 (1194). That a father cannot validly give his wife's *maritagium* to his daughter in *maritagium*, see Woodbine's notes to Glanvill, p. 234, and add 1 C. R. R. 75 (1199). In 1127 this was done, with compensation to the wife and her relatives: 10 P. R. S. (*Ancient Charters*), No. 12.

⁴⁰ This bar and the homage-bar are pleaded in 1 Palgrave, 39—40 (1194). Her second husband seems unable to plead it in 14 P. R. S. 20 (1194).

⁴¹ Cf. 14 P. R. S. 42 (1194): Mabel, a widow, sues a Prior for land and advowson alleged to be part of her *maritagium*. The Prior seems to say that her husband conveyed it to him and that their son ought to warrant him. Mabel seems to answer that someone ought to warrant her and her son, because it is her *maritagium*. The Prior then says something which may be that he ought not to answer her without her warrantor [the common formula in dower]. The record is defective.

⁴² 10 P. R. S. (*Ancient Charters*), No. 12 (1127): her father's heir is to 'maintain and defend' her *matrimonium* from all injury. Other early cases of *maritagium* include *ibid.* No. 6 (1121); and 14 P. R. S. 25 (1194), which tells of *maritagium* given sixty years before, *semble*, without a charter.

⁴³ E.g., 14 P. R. S. 20 (1194), with its sequel 1 C. R. R. 163 (1200). I have not noted any express warranties in grants of *maritagium* by fine during this period.

⁴⁴ Little is seen of Glanvill's rule which had restricted the warranty to the *reasonable* gifts of the ancestor: see p. 195, *ante*, and footnote ⁵¹, *post*. So long as the right heir lives, the next heir is not liable on the warranty: 1 C. R. R. 89—90 (1199); Plac. Abr. 61 (S. C. wrongly dated).

that the bond of warranty can ordinarily extend further, to mere assigns.⁴⁵

§ 2.—WARRANTY AS A BAR

One of the important features of a warranty is that it defeats (or 'bars') the warrantor in any action he may bring to recover the land from the person whom he ought to warrant. And if, as we have seen, a donor's warranty binds his heirs after him, this warranty-bar has the important result that it enables his conveyance to bind his heir. We have already observed something of this bar in conveyances made in return for homage or by fine.⁴⁶ There are signs in our period, however, that the warranty-bar is raising a very awkward problem. Does the presence of a warranty bind and bar the grantor's heir even where, for some reason or another, the grant was invalid or defective?

The husband who attempts to dispose of his wife's inheritance or *maritagium* will become troublesome in the thirteenth century.⁴⁷ She cannot contradict his conveyance whilst he is alive; and when they are dead, her heir is usually his heir also. Accordingly, if her heir sues after her death to recover such land which the husband had wrongfully conveyed to *P*, *P* will answer that the plaintiff is barred by his late father's warranty. An early example of this dilemma is seen as our period is ending.⁴⁸

Our period provided two more illustrations of the impact of warranty-bar and defective gift. Each raises the question whether the heir is bound by gifts which are imperfect for want of seisin.⁴⁹ First, is the heir bound to warrant his ancestor's death-bed gift? Second, is the heir bound if his ancestor purported to give an advowson and the donee never obtained seisin of the gift by presenting a parson during the donor's lifetime?

Glanvill states that *death-bed gifts*, made by one's last will, are valid if made with the heir's consent and confirmed by his acquiescence: otherwise, unlike gifts of a reasonable part of one's land *inter vivos*, the heir is not bound.⁵⁰ Heirs, summoned unwillingly to warrant their father's gifts, are thus inclined to answer that their father was seised on the day he died and, perhaps, that he made the gift when *in extremis*.⁵¹

⁴⁵ Cf. 17 P. R. S. No. 171 (1196), a vifage of land, by fine, for a term of four years ends with an express warranty by debtor and his heirs to creditor *and his assigns*. Occasionally a grant or quit claim by fine is made to *A* 'and his assigns': e.g., 24 P. R. S. (1199), Nos. 216, 258—in the latter *A* is *sacerdos*. Occasionally a grantee and his heirs are expressly forbidden to alienate: e.g., 23 P. R. S. (1198), Nos. 181, 190. For assigns in the later law of warranty see 8 Camb. L. J. 295–299.

⁴⁶ *Ante*, p. 194.

⁴⁷ 9 Camb. L. J. pp. 90 *et seq.*

⁴⁸ 1 C. R. R. (1200), 163, 342–343. Ultimately they compromised: 3 C. R. R. 204 (1204). Their litigation had begun in 1194 (14 P. R. S. 20) with a precocious writ of entry. For *maritagium* and warranty bar, see further footnotes ³⁹, ⁴⁰, *ante*.

⁴⁹ If donor was never seised, his warranty is already invalid: 1 C. R. R. 96 (1199). In the thirteenth century warranties are held invalid even for a donee's want of seisin: 8 Camb. L. J. 286.

⁵⁰ Bk. 7, c. 1.

⁵¹ E.g., 1 Palgrave, 157–158 (1198), continued *ibid.* 168, 363—grandfather's gift with charter, no judgment recorded; 1 Palgrave, 427 (1199)—father's gift with charter, heir pleads also that father gave away over one-third of his lands and prays judgment whether he 'ought to warrant such gifts,' they concord,

Nevertheless, there is a strange case in 1194. The infant Henry is bringing mortdancesthor against a prioress who is deforcing him of thirty shillings of rent. The Prioress blandly admits that Henry's father died seised of this rent, but she contends that none the less Henry 'ought to warrant his father's charter'—a charter whereby the father had purported to give her this rent as from his death. Stranger still, the Court's only doubt as to the justice of her claim seems to be whether the charter can bar Henry whilst he is still under age; and he is forced to accept a temporary compromise whereby, during his infancy, the Prioress and her convent are to hand over to him one half of the rent for his maintenance.⁵² Evidently the law is on the brink of deciding that a charter suffices in lieu of livery of seisin. The King's Justices are beginning to feel that the new action *de warrantia cartæ* will bar a donor's heir so strongly as to perfect an imperfect gift: by suing this action against the heir, one can compel him, perhaps, to give the seisin which will perfect one's title. As our period nears its end, there are signs of this belief not only for gifts of things incorporeal, such as rents and advowsons,⁵³ but even for gifts of corporeal land.⁵⁴ It is common knowledge that in the one case this development held, whereas in the other it came to nothing.

The problem of the *advowson* was particularly acute because its owner has so seldom an opportunity to assert his seisin. If he owns the advowson as an appendage to land to which it is attached, his seisin of the land is a sufficient seisin of the advowson also. But if the advowson has been severed from the land—if, for instance, he has been given it without the land to which it was originally appendant—he will not be 'seised' of it until the church falls vacant and he duly presents a parson to fill the vacancy.⁵⁵ Glanvill has only two actions for recovering an advowson: (i) by writ of right; (ii) by the possessory assize of darrein presentment.⁵⁶ Each of them is based upon a precedent seisin. The result of a darrein presentment is that he who, or whose ancestor, is found to have presented the last parson (who is now dead)

⁵² 1 Palgrave, 64—65 (1194). This seems strangely like enforcing a testamentary gift of land: but the compromise was made 'saving the right of both parties.' Usually in mortdancesthor an infant heir recovers seisin without question: see Glanv. Bk. 13, cc. 4, 5.

⁵³ (i) Action for rent (1199—1200) by Thomas Blac: he is said to be suing the same defendant in *warrantia cartæ* and in plea of land (presumably writ of right for there is *essoïn de malo lecti*); ultimately defendant quitclaims to him by fine: 1 Palgrave, 270, 300, 310; 2 Palgrave, 64, 187, 247. (ii) Hubert de Halketot sues to establish his enfranchisement (1194—1201); his plea is described both as *warrantia cartæ* and as plea of liberty or villenage; ultimately he loses through a default of appearance: 1 Palgrave, 106, 230, 233, 319, 376; 7 C. R. R. 340; 2 Palgrave, 56; 1 C. R. R. 210, 246, 344, 370, 461; 2 C. R. R. 11, 13 (s.c. Plac. Abr. 32; 3 Selden Society, pl. 78). (iii) For advowsons, see next paragraph.

⁵⁴ (i) Richard de Heirun sues *warrantia cartæ* and 'plea of land' for two virgates (1198—1199); he seems to be seised now but is alleged not to have got seisin in donor's lifetime; no judgment recorded: 1 Palgrave, 157, 168, 294, 298, 363. (ii) Lucas de Burnham sues *warrantia cartæ* and 'plea of land' (1199—1200); a fine follows in his favour: 1 Palgrave, 234, 278, 452; 1 Hunter's Fines, 183—184.

⁵⁵ See 2 P. and M. 135—138.

⁵⁶ Bk. 4, c. 2; Bk. 13, cc. 18—22. It seems that pleas of presentation to a mere vicarage belonged to court christian: 14 P. R. S. 10 (1194).

is entitled to present a new parson in his place.⁵⁷ Obviously, this action is of no use to a donee who has never yet presented a parson to the church: indeed, it is a menace to him, for it can be used against him by the donor's heir.⁵⁸ What, then, of the Writ of Right? Does that offer any protection to our donee with his imperfect gift? On principle, the Writ of Right ought not to help him; for it, too, is founded upon seisin—an ancient seisin of the plaintiff's ancestor.⁵⁹ Yet Glanvill seems to say that our donee *can* bring an action on the mere right of advowson: he can admit that his adversary's ancestor presented the last parson, and thereupon, although his adversary can fill any existing vacancy, the question of 'right' will determine who is to make presentations thereafter.⁶⁰ There is some evidence perhaps among the contemporary cases that such gifts, imperfect for want of seisin, could thus be enforced against the donor's heir by something like a writ of right.⁶¹ But a victory which enabled one's adversary to fill the existing vacancy can have had little to commend it; and our period shows that in practice this drawback was being avoided by those to whom advowsons had been granted by a charter. First, one could sue an action *de warrantia cartæ* against the donor's heir (simultaneously, perhaps, with a writ of right) and so, by virtue of the warranty-bar, obtain a judgment which would wrest from him both his inherited seisin and the right to fill any existing vacancy in the church.⁶² Then we discover that in this action, although

⁵⁷ Darrein Presentment could be used only whilst the church was vacant: Glanv. Bk. 13, c. 19, and Woodbine's note thereto.

⁵⁸ The donee can defeat the heir's action by pleading the gift only where the gift included lands to which the advowson was appendant: Glanv. Bk. 13, c. 20. Maitland seems to overlook his reservation: 2 P. and M. 136—137. I have found no case where a donee of advowson in gross barred the heir's darrein presentment by pleading the gift.

⁵⁹ See the count in Booth, *Real Actions*, 122—123. The early counts are usually for advowsons appendant and speak of the church being founded in the ancestor's fee: e.g., 1 Palgrave, 61 (1194); 1 C. R. R. 24 (1196); 7 C. R. R. 328 (1196). There was evidently a presumption that the advowson of a church was appendant to the surrounding land: 14 P. R. S. 32 (1194); 1 C. R. R. 32 (1198); 1 Palgrave, 391 (1199).

⁶⁰ Bk. 4, c. 1; Bk. 13, c. 20. Glanvill seems to assume that the church is vacant so that the donee's adversary could sue darrein presentment. It is no defence to darrein presentment that defendant has already brought a writ of right which is still pending: see 1 Palgrave, 378 (1199), a darrein presentment, *re* the church of Coton, Cambs., which dragged on until this problem was settled by the King's writ to the justices: 1 C. R. R. 42, 236, 443, 447.

⁶¹ Possible cases of it are 1 Palgrave, 378 (see preceding note); also 14 P. R. S. 122—123 (1195). Maitland indexed the latter as writ of right, but it seems to be an early *quare impedit* (see note ⁶³, *post*); Plac. Abr. 80 is the same case wrongly dated, and 17 P. R. S. No. 171 (1196), is the resulting fine which shows that the donee's case was thought to be a strong one.

⁶² (i) *Abbot of Warden's Case* (1199—1200) has sixteen entries in all; the abbot begins with a 'plea of warranty of charter' against his donor's co-heiresses (1 C. R. R. 76), and then is seen suing them for the advowson on their father's charter (2 Palgrave, 99, 201; Plac. Abr. 23, 24); he wins and is awarded seisin despite defendants' repeated objections that their father presented the last parson and something illegible about not warranting (1 C. R. R. 238, 251; Plac. Abr. 25); this may involve a writ of right, for in one passage (2 Palgrave 99) are the words *quare ei deforc' ut dicat*. (ii) *Abbot of Pipewell's Case* (1199—1200) likewise begins as 'plea of warranty' and is later described as 'plea of advowson' and then as *loquela de ecclesia*; we have not the rolls of Mich. 1198 which contain the main hearing, and there is no special hint that it involved a writ of right: 1 C. R. R. 85, 276; 1 Palgrave, 256. (iii) See also *Abbot of News' Case* (1199—1200) which ended in a fine: 1 Palgrave, 237; 2 Palgrave, 194; 1 C. R. R. 185, 289. Perhaps these cases were the

it is still recorded as a plea *de warrantia cartæ*, the plaintiff is beginning to say that the defendant-heir is 'impeding' him in his right of patronage. And so a new action was born with a name of its own—the *Quare Impedit*.⁶³ It resembled the action of warranty in that it was founded upon a gift by charter; it resembled the writ of right in that it brought one seisin. Hitherto it has been assigned to the early thirteenth century;⁶⁴ but its beginnings can be clearly seen in the latter half of King Richard's reign. Thus the problem whether the heir must warrant his father's imperfect charter-gift appears to be solved. A new action has been evolved to bind and bar the heir.⁶⁵ This new action, I think, was the beginning of the end of the old doctrine that the grant of an advowson is imperfect without seisin. But the complete disappearance of that doctrine was doomed to be delayed until long after our period is over. As our *Quare Impedit* develops, two limits will be set upon it: (i) it will not apply unless the donor himself was seised; (ii) it will not avail if the donor or his heirs manage to present at the next vacancy which arises after the gift is made.⁶⁶

§ 3.—VOUCHER TO WARRANTY

During Richard's reign there is much vouching of warrantors in pleas of land.⁶⁷ And, on the whole, the rules are similar to those of the following century.⁶⁸ Defendants sued by *writ of right* may vouch a warrantor; and if he duly comes to Court and warrants, he stands in the defendant's place and may put himself on the Grand Assize or do battle to defend the land,⁶⁹ or with the Court's consent may make some compromise with the plaintiff,⁷⁰ or he may vouch another warrantor of his own.⁷¹

new *Quare Impedit* and the scribe has no traditional name for them; but cf. footnote ⁶³ *infra*.

⁶³ *E.g.*, 1 C. R. R. 18 (1196) '*de placito impedicionis presentacionis*'; 24 P. R. S. 243 (1196), '*de placito impeditenti presentare idoneas personas*' to two churches 'which are vacant.' This action may conceivably be earlier still, for the rolls seldom tell one more than that a case is *de placito advocacionis ecclesie*. What looks like writ of right is sometimes *quare impedit*; see footnote ⁶¹, *ante*; also *Abbot of Stanlee's Case* (1198—1200) comprising ten entries of which only the first two show that it is *quare impedit*—the others call it plea of advowson or of warranty of charter: 1 C. R. R. 44, 65, 142, 143, 201; 1 Palgrave, 239, 313, 397; 2 Palgrave, 53, 226.

⁶⁴ 2 P. and M. 138, and footnote.

⁶⁵ See Booth, *Real Actions*, pp. 223 *et seq.*, for a detailed account of the *quare impedit*. In it a donee would count on his donor's seisin and on the charter of gift; and a reversioner could count on the seisin of tenant for life. It applied only when the church was vacant. In our period there is already a *writ of entry* for an heir who, having recovered his inheritance from a wrongdoer, discovers that the latter has alienated its advowson to one 'who has no entry *nisi per ablatorem suum*': 1 Palgrave, 391 (1199).

⁶⁶ See 2 P. and M. 137—138; 3 Holdsworth, H. E. L. 98—99. It was already decided in our period that a warranty given by a donor who had never himself been seised is inoperative: see footnote ⁴⁹, *ante*.

⁶⁷ As regards warranty in pleas of chattels and of felony, see *e.g.*, 14 P. R. S. (1194) 22—23, 102—103; also Glanv. Bk. 10, cc. 15—17.

⁶⁸ For vouchers in the thirteenth century, see 8 Camb. L. J. 287—294.

⁶⁹ *E.g.*, 1 Palgrave, 358 (1199); *ibid.* 417 (1199) continued in 1 C. R. R. 221; 2 Palgrave, 95 (1199); also Glanv. Bk. 3, c. 1.

⁷⁰ *E.g.*, 1 C. R. R. 23 (1196); 7 C. R. R. 330 (s.c.): defendant vouches his lord the Abbot who warrants and, two years later, makes fine with plaintiff—23 P. R. S. No. 138.

⁷¹ *E.g.*, 1 C. R. R. 160, 315, which began in 1198 (1 Palgrave, 166): defendant vouches his wife who vouches her brother and (on his death) his son. See also 1 Palgrave, 417.

Yet it is dangerous to vouch a warrantor, lest he contest the warranty and leave one undefended; and it is almost more dangerous to ignore him, for then one forfeits one's right to claim *escambium* from him if the plaintiff prevails.⁷²

Glanvill seemed doubtful whether one could ever vouch a warrantor in a *possessory assize*.⁷³ The possessory assizes were designed to procure swift justice, and the vouching of warrantors means delay. So far as *mortdancestor* is concerned, however, any such doubts must soon have disappeared. In 1194, when our records begin, defendants in *mortdancestor* are already vouching their warrantors;⁷⁴ and before long such vouchers begin to outnumber all others. In *novel disseisin*, the most speedy action of all, Glanvill is quite certain that one does not await a warrantor.⁷⁵ The defendant can vouch in such a case only if he have admitted the disseisin, so that the plaintiff's judgment is not delayed. This means, of course, that here the warrantor is not vouched at all in the usual sense of being called upon to defend the land against the plaintiff. The sole object of thus vouching, or rather (as some MSS. of Glanvill's book prefer to call it) 'naming,' a warrantor in *novel disseisin*, is to induce the Court to have him summoned, so that one may sue him immediately for an *escambium* to replace the lands which one has lost in the action.⁷⁶ I have noted only five cases, from the records of our period, which show any vouching or warranting in the course of an action of *novel disseisin*; and in each of them the circumstances were exceptional. Twice a defendant vouches the King and thereby prevails;⁷⁷ another defendant, who is but a termor, 'vouches' and is duly warranted by his lessor;⁷⁸ and twice a *plaintiff* vouches, or is said to have been warranted in Court by, his lord.⁷⁹ The rest is silence; and this very silence, perhaps, is a sufficient illustration of Glanvill's rule.

The only other action in which there was much vouching to warranty, during this period, was the widow's action for her *dower*. This has been

⁷² Glanv. Bk. 3, cc. 1—5. See also 1 C. R. R. (1199) 89—90; Plac. Abr. 61 (s.c. wrongly dated): vouchee in writ of right successfully counterpleads the voucher; judgment for plaintiff 'because defendant has no warrantor thereof.' See further § 4, *post*.

⁷³ Bk. 13, c. 30.

⁷⁴ *E.g.*, 14 P. R. S. 5 (1194); 1 Palgrave, 19 (1194); 14 P. R. S. (1195) 125, 126, 133—134—these two latter pleas are curious in that fathers seem to claim to inherit from their deceased sons.

⁷⁵ Bk. 13, c. 38, and Woodbine's note thereto: nor is any *essoin* permitted in *novel disseisin*.

⁷⁶ *Ibid.* Cases of *escambium* for land lost by *novel disseisin* include 24 P. R. S. (1196) 215, 217—218; 1 Palgrave, 82 (1194).

⁷⁷ 14 P. R. S. 8 (1194)—the manor is in the King's hand (1 C. R. R. 52); 14 P. R. S. 71 (1194)—defendant had seized the land on the King's behalf from one of Earl John's supporters. See below, pp. 204—205, as to vouching the King.

⁷⁸ 1 Palgrave, 153—154 (1198). This is not strictly voucher at all, see *ante*, p. 196.

⁷⁹ 1 Palgrave, 62—63 (1194)—plaintiff vouches his lord to prove that he ought to hold of him and not of defendant. 1 C. R. R. 197 (1200) brings to light an old case from the Salop Eyre: the recognitors are now giving a detailed report of it at Westminster and then are asked specifically 'whether Eve of Longford then came into court to warrant' the successful plaintiff in the *novel disseisin*. They reply that they do not know. This case can be dated by Robert de Witfeld, one of the named Justices of that Eyre. He was dead by 1194 (5 P. R. S. N. S. 93) and his last recorded eyre in that county seems to have been 1192 (2 P. R. S. N. S. 257).

mentioned above, in right of its peculiar feature that the widow-plaintiff must produce her late husband's heir as her warrantor.⁸⁰ In these actions, the heir was in an unenviable position, for the defendant was almost always his late father's donee and, accordingly, almost always vouched him to warranty.⁸¹ Thus the heir, as warrantor of both sides, was bound to lose, however the case might go: either side, on losing the case, could claim *escambium* from him. This is also the law of the thirteenth century.⁸²

In actions for *advowsons* the normal vouching to warranty seems to have been virtually non-existent.⁸³ But there are when our rolls begin several curious entries about men, evidently clerics, who (instead of the *vocavit* of a normal voucher) *advocavit* somebody concerning a certain church of which *X* is claiming the advowson.⁸⁴ The indications are that such a man is parson of the church concerned; that *X*, as a prelude to a writ of right of advowson, first sues the parson (e.g., by a writ in the nature of a *quo warranto*) in order to discover who is his patron; and that the parson, though he may get *escambium* from his patron if *X* ultimately prevails, is 'vouching' his patron rather as a lessee vouches his lessor that *stricto sensu*.⁸⁵ And here it seems likely that we see the origin of the word 'advowson'—the *advocacio* of the early rolls—and the reason why a patron is called *advocatus* in the King's writ of darrein presentment and elsewhere. It is not unlikely, indeed, that the parson calling his patron is our oldest variety of voucher to warranty.

Finally, it should be mentioned perhaps that the verb *to vouch* was sometimes used in a fashion different from that with which we are primarily concerned. A party who rests his case upon some previous judgment in his favour will 'vouch' the rolls of the Justices;⁸⁶ an

⁸⁰ *Ante*, pp. 196—197.

⁸¹ *E.g.*, 14 P. R. S. 7—8 (1194)—the heir-warrantor is a hostage for the King in Germany; 1 Palgrave, (1199), 415 *bis*—defendant alleges that the husband gave the land to him before marrying plaintiff.

⁸² See 8 Camb. L. J. 283—284.

⁸³ The only case I have found is a darrein presentment against a husband who vouches his wife on the ground that the church is founded upon her land: 1 C. R. R. 24 (1196).

⁸⁴ 1 Palgrave (1194) 1 (*bis*, of which one is a dean); 9 (a priest); 19 (evidently a vicar—cf. 14 P. R. S. 10). These entries are probably related to the action *quo (advocato et) warranto tenet se in ecclesia* which one can bring against a parson—presumably in order to compel him to disclose his patron so that one can then sue the patron by writ of right: see 14 P. R. S. 33 (1194) and its sequel 1 Palgrave, 8; also 1 Palgrave, 317 (1198), 416 (1199); 7 C. R. R. 342 (1198); 1 C. R. R. 103 (1199). In 14 P. R. S. 6—7 (1194), the defendant chaplain in *quo warranto* vouched plaintiff himself, and acknowledged his right to the advowson of the chapel.

⁸⁵ It is writ of right (not darrein presentment) since the church is evidently full. When the patron comes to court in 14 P. R. S. 69—70 (1194), he is said to 'warrant' the parson (here a dean) and becomes the defendant—see also Plac. Abr. 11 (s.c.) and continuation in 1 Palgrave, 130. If parson and patron are sued together, the parson says (as a termor would say—*ante*, p. 196) that he 'claims nothing therein except as parson (as termor) of the gift of' his co-defendant. This occurred in 14 P. R. S. 122—123 (1195); Plac. Abr. 80 (s.c. wrongly dated), where the parson, an abbot, suspecting that his patron is about to lose, reminds the court that he must warrant him and says what sum he is prepared to accept as his *escambium*. See also preceding footnote.

⁸⁶ 1 Palgrave (1194) 5, 88; 14 P. R. S. 73 (1194). See also 1 Palgrave, 440 (1199)—plaintiff vouches shire court; 1 C. R. R. 90—97 (1199)—vouchee vouches court baron.

attorney whose authority is questioned may 'vouch' the Court wherein he was appointed;⁸⁷ a claimant who rests his case upon a charter which his adversary alleges to be a forgery may 'vouch' the charter-witnesses to support its validity;⁸⁸ a defendant who says that the act complained of was done in execution of the King's precept may 'vouch' the official who was engaged in the matter.⁸⁹ Such vouchings continue in the thirteenth century;⁹⁰ but they are a very different thing from the normal voucher to warranty, which brings a man into Court to become defendant in one's stead. One other anomaly deserves mention: though rare in our period and thereafter, it seems to be ancient and our voucher may derive from it. Sometimes in an action for land the contention between the parties imperilled the lord's title. The plaintiff, perhaps, claimed to hold the land of *A* whereas the defendant claimed to hold it of *B*. In such a case the alleged lords were entitled to intervene and each party, plaintiff or defendant, was said to 'vouch' him whom he alleged to be the true lord of the fee.⁹¹ Here again we have something quite distinct from the normal voucher to warranty.⁹² It resembles rather the *aid-prayer* of the thirteenth century.⁹³

§ 4.—WILL THE VOCHEE COME AND WARRANT?

A defendant who comes into Court and vouches a warrantor may have brought the warrantor with him and so may have the satisfaction of hearing him enter straightway into the warranty and thereby become defendant in his stead.⁹⁴ In practice, however, so ready and willing a warrantor was very rare. When a defendant vouched someone, the normal procedure was to adjourn the case after assigning to the defendant some reasonable day at which (if we ignore the permitted essoins) to produce his vouchee in Court.⁹⁵ And if the vouchee does not come on the stated day, the defendant will be in grave difficulty: his land is imperilled if not lost for ever.⁹⁶ Even when King Richard was

⁸⁷ 14 P. R. S. 31—32 (1194).

⁸⁸ 14 P. R. S. 30 (1194).

⁸⁹ 14 P. R. S. 22—23 (1194), appeal of felony; 1 Palgrave, 82 (1194), novel disseisin; 1 C. R. R. 28—29 (1196), same.

⁹⁰ See 9 Camb. L. J. 86.

⁹¹ For the rules and procedure in such a case, see Glanv. Bk. 3, cc. 6—8. Such a case cannot be held in court baron: *ibid.* Bk. 12, c. 8. Examples include 1 Palgrave, 62 (1194), novel disseisin; 1 C. R. R. 101 (1199), *quod permittat*, continued 1 Palgrave, 437.

⁹² *E.g.*, even plaintiff can vouch in such a case; the vouchee need not come; even if he does come he may entrust the plea to his voucher.

⁹³ See preceding footnote, and 9 Camb. L. J. 82—83.

⁹⁴ This seems to happen in 14 P. R. S. 5 (1194), a mortdancestor; but the ready warrantor offered no argument for the defence; so the verdict of the jurors would have been taken immediately had they not absented themselves.

⁹⁵ Glanv. Bk. 3, c. 1. The record will say 'Let him (voucher) have him (vouchee) at Westminster' on such a day: *e.g.*, 1 Palgrave, 33 (1194), 417 (1199); 14 P. R. S. 125—126 (1195).

⁹⁶ In writ of right, the land is taken into the King's hand: Glanv. Bk. 3, c. 4; 1 C. R. R. 82 (1199); but can be replevied pending final judgment if defendant show a good excuse: 1 Palgrave, 9 (1194). If both vouchee and defendant defaulted it cannot be replevied: 14 P. R. S. 46—47 (1194). In mortdancestor a vouchee's default meant only, semble, that the verdict of the assize would be heard at once: Glanv. Bk. 13, cc. 12, 30, See Camb. L. J. 290 for the rules of the thirteenth century.

vouched these were the rules applied, save that his Justiciar would come to Court on his behalf.⁹⁷

If a vouchee duly came to Court but then refused to act as the defendant's warrantor, it seems that the case was regarded as undefended; there is no further argument about the merits of the plaintiff's claim: the case is now simply a contest between the defendant and his unwilling vouchee (even to the duel, says Glanvill) to determine whether the latter owed a warranty and therefore ought now to provide *escambium*.⁹⁸ Likewise, the case was regarded as undefended if, in a mortdancestor, the vouchee failed to come to Court: the verdict of the assize is heard without further delay; and, if that verdict goes against the defendant, he can litigate the question of *escambium* by suing a new action against the defaulting vouchee.⁹⁹ Sometimes, of course, a defendant who had a possible warrantor preferred to defend the case himself and therefore did not vouch him. Such a defendant, whether in mortdancestor or writ of right, could claim no *escambium* at all if his land were lost in the action, for his failure to vouch had deprived his warrantor of all opportunity to defend it.¹⁰⁰

The problem of the vouchee who refuses to come or, having come, refuses to warrant, was irrelevant of course in pleas of novel disseisin. In novel disseisin, as we have seen, no vouching was allowed.¹⁰¹ But in writ of right and particularly in mortdancestor the problem was serious indeed. It is true that Glanvill has a writ whereby one who has been vouched as warrantor can be summoned to come to Court to warrant a gift or to show why he ought not to warrant it. It is a writ in the King's name, and can be used against an unwilling vouchee 'on the advice and indulgence of the Court.'¹⁰² But Glanvill seems to say that

⁹⁷ 14 P. R. S. 8 (1194)—Justiciar comes; 1 Palgrave, 9—10 (1194)—Justiciar does not come. The latter entry is of special interest: defendant tells how he took to the Justiciar a 'writ' from the King upon the matter. Each entry bears a marginal note that the Archbishop-Justiciar is to be consulted. For vouching the King in thirteenth century, see 8 Camb. L. J. 288, 292.

⁹⁸ Glanv. Bk. 3, c. 1 (right). Both sides offered battle in 1 C. R. R. 97 (1199). In mortdancestor, if vouchee counterpleads the warranty the verdict of the assize may be taken at once; then, if their verdict is for the plaintiff, the plea becomes a plea of warranty between defendant and vouchee upon the question of *escambium*: see William fitz Randulf's litigation (1198—1199): 1 Palgrave, 195; 1 C. R. R. 97; 1 Palgrave, 354, 364. In the unhurried action of *Right*, plaintiff must wait until the vouchee's counterplea has been decided; then, if the counterplea has succeeded, plaintiff gets judgment at once: 1 C. R. R. 89—90 (1199); Plac. Abr. 61 (s. c. wrongly dated). A plaintiff complains of such delay in 14 P. R. S. 124 (1195). These procedural rules seem to become rather different in the thirteenth century: see 8 Camb. L. J. 290.

⁹⁹ For this there was a writ *praeipecto quod faciat rationabile escambium*; see 1 C. R. R. 39—40 (1198); also *ibid.* 81, the sequel of 1 Palgrave, 151 (1198). But there are signs that the original writ for such a claim was or soon became the writ *de warrantia cartae*: see, among the prolonged attempts made by the Prioress of Clerkenwell against Simon fitz Simon, 1 Palgrave, 442; 2 C. R. R. 139, 147, 153, etc.; her action is sometimes described as *warrantia carte* and sometimes as plea of *escambium*. See also footnote¹⁰⁸, *post*.

¹⁰⁰ Glanv. Bk. 3, c. 5 (right); 1 C. R. R. (1198) 39—40, mortdancestor.

¹⁰¹ *Ante*, p. 202.

¹⁰² Glanv. Bk. 3, cc. 2, 3. In the thirteenth century the record will say in such a case, 'Let him have by aid of the Court' (see Woodbine's note to c. 3). In the one instance I have found in our period it says, after the voucher, 'Let him have a writ to have his warrantor': 1 Palgrave, 432 (1199).

one cannot get this writ until one has actually vouched the reluctant one,¹⁰³ and that one cannot get it without the Court's assistance. As we have seen, once one has actually vouched, one's fate is in the vouchee's hands. It follows that defendants needed a better writ than this—a writ by which one's potential warrantor might be sued in advance so that one might learn, before vouching him, whether he will warrant or no. Perhaps, though he does not say so, Glanvill's writ of summons could in fact be used, as an original writ, for this purpose also. But the writ which was so used in later years is the Writ *de warrantia cartæ*, and Glanvill's book says nothing of any such writ nor does his own writ say anything about a charter.¹⁰⁴

If we can trust the scribes who enrolled the records of our period, there were plenty of pleas *warrantie carte* in 1194 (when our records begin) and thereafter. And patient searching will sometimes reveal that *A* who is said to be suing *B* in a plea *warrantie carte* is himself being sued for his land by *Z*,¹⁰⁵ and perhaps is vouching *B* to warranty in that action.¹⁰⁶ There is some evidence, moreover, that the *warrantia cartæ* is already more useful to defendants, uncertain whether to vouch, than the writ which Glanvill knew.¹⁰⁷ And there are hints that it is already in use for obtaining from one's warrantor *escambium* for lands which one has lost in an action of novel disseisin.¹⁰⁸

¹⁰³ Bk. 3, c. 2: '*Ad petitionem ejus qui eum vocavit warrantum.*' Woodbine's edition gives no variant for this; yet Beames merely writes 'upon the petition of the tenant.'

¹⁰⁴ The only passage I think in which Glanvill speaks of warranting a charter is concerned only with creditors suing their debtors (Bk. 10, c. 12) and is preceded by his famous statement that the King's court is not in the habit of protecting *privatas conventiones* of this kind (Bk. 10, c. 8). In 1199 the parties to a plea of debt (1 Palgrave, 257) are simultaneously contending in a plea *warrantie carte* (1 C. R. R. 111; 1 Palgrave, 367).

¹⁰⁵ (i) Ralph of Rouec: 1 Palgrave, 131 (1194); 14 P. R. S. 13 (1194). (ii) Martin de Bello Fago: 1 Palgrave (1194) 18—19, 126, resulting in a fine—23 P. R. S. No. 150 (1198). (iii) Compare 1 Palgrave, 70 (1194), where *B* is summoned by *A* to warrant a chirograph and does so.

¹⁰⁶ E.g., Gilbert fitz Ailnoth is sued in mortdancesthor and vouches William fitz Randulf: 1 Palgrave, 195 (1198); 1 C. R. R. 97 (1199); and loses through his default—1 Palgrave, 354 (1199). Then Gilbert sues Willam de placito *warrantie carte*: 1 Palgrave, 364 (1199); 1 C. R. R. 461 (1201). Ultimately they concord: 2 C. R. R. 234 (1203). The Pancefot litigation was similar (1194—1199), but there the plea is called *warrantie terre*: 1 Palgrave, 110, 224; 2 Palgrave, 47, 138.

¹⁰⁷ (i) Martin de Bello Fago seems to sue *B de warrantie carte* and then refrain from vouching him in a mortdancesthor: 1 Palgrave (1194) 18—19, 126. (ii) Giffard of Gedelston seems to do the same in 1198: 1 Palgrave, 167; 24 P. R. S. No. 129. (iii) The Abbot of Winchecumbe sues warranty of chirograph against *T* (who warrants at once) in expectation that another is about to claim his land: 1 Palgrave, 70 (1194).

¹⁰⁸ It so operated in the thirteenth century: 8 Camb. L. J. 285. In our period there is clearly some judicial proceeding for obtaining *escambium* for land lost in novel disseisin: 1 Palgrave, 82 (1194). Two actions by Adam de Leus against his brother seem to show that it is by plea of warranty of charter leading to a writ of execution *quod faciat rationabile escambium*: 24 P. R. S. (1196) 215, 217—218. See also footnote ⁹⁰, ante. Robert de Wudecot's plea *de warrantia carte* in 1194 as to the land of 'Corshal' (14 P. R. S. 14) seems almost certainly to result from his loss of that land (of 'Chershal') in an action of novel disseisin a year or two previously (2 Palgrave, 239; 1 C. R. R. 197, as to which see footnote ⁷⁹, ante).

§ 5.—DE WARRANTIA CARTÆ

(1) THE WRIT

Glanvill says nothing of any original writ *de warrantia cartæ*.¹⁰⁹ Yet it occurs in both of the two earliest registers of original writs (*circa* 1227 A.D.) that I have seen.¹¹⁰ Each of these two specimens, unlike Glanvill's judicial writ of summons, is a *præcipe*; and each states that the plaintiff 'holds and claims to hold' the land of the defendant and that he has the latter's charter or his ancestor's.¹¹¹ Our question is whether any such original writ existed in Richard's reign.

The rolls of our period rarely mention any kind of writ. The scribe writes (if we extend his shorthand) *placitum warantie* (or *warantie*) *carte*, and only once does he disclose that such a *placitum* involves a writ.¹¹² Nevertheless, the available evidence raises an irresistible presumption, I think, that the writ and action *de warrantia cartæ* were well established before the end of Richard's reign. And there are indications that we should have more evidence still, had we the records of the shire or even of the lesser local Courts.¹¹³ By a fortunate chance, for instance, a full record has survived of an action of right held in a shire Court in the year 1193. And when that action was already well under way the defendant, who had not yet vouched anybody, suddenly 'brought the Justiciar's writ that William de Hurton (defendant's lord) should warrant to him his charter of the said land.'¹¹⁴

It is not easy to discover when our writ achieved its final form—the *præcipe* requiring *A* to warrant to *B* certain land *quam tenet et de eo clamat tenere et unde cartam suam habet ut dicit*.¹¹⁵ The records of our period seem hardly to have reached that stage of development in which the scribe is expected to begin each entry with some indication of the

¹⁰⁹ *Ante*, p. 206; Maitland, 2 Collected Papers, 127.

¹¹⁰ They are Cambridge University Library MS. II. vi. 13, and British Museum MS. Cotton, Julius D., II. f. 143b. Maitland dated them and had seen none earlier: 2 Coll. Papers, 130, 135.

¹¹¹ The British Museum writ tells the sheriff to command defendant to warrant or else to have him before the Justices in Eyre. The Cambridge writ commands the sheriff to *cause* him to warrant or else have him before the next assize. The latter looks the older somewhat resembling a writ of Justities, and hints of an initial hearing in the shire court; cf. footnote ¹¹³ *post*.

¹¹² 1 C. R. R. 111 (1199): 'A day is given to Adam and Peter *de placito warantie carte* on Easter day in five weeks because the sheriff has not sent the writ.' At that day there was a further adjournment: 1 Palgrave 367. Meanwhile the parties are suing each other for debt—cf. footnote ¹⁰⁴ *ante*.

¹¹³ In 1 Palgrave 48 (1194) Plac. Abr. 2 (s.c.) a lord prays his court and has it *de placito warantie carte*. Glanvill expressly excluded from his treatise pleas in lord's court and shire court (Bk. 12, cc. 6, 23); but the shire court had a very wide jurisdiction to hear cases commenced by the King's writ (Bk. 12, cc. 9 *et seq.*). Cf. footnote ¹¹¹, *ante*.

¹¹⁴ *Geoffrey de Hurton's Case*, 14 P. R. S. 124, see *ante*, p. 195. The contraction used (*Justic*) might conceivably mean a writ from the *Justices* or of *Justities*. Justiciar seems more likely, I think since the King's writs commonly bore the Justiciar's name—see e.g. Glanvill's writ of right, Bk. 1, c. 6.

¹¹⁵ Booth, Real Actions, 241. This formula was already used (but without mention of a charter, as a rule) in the writ *quod capiat homagium*: Glanv. Bk. 9, c. 5; 14 P. R. S. 135; 24 P. R. S. 228; 1 C. R. R. 86, 95. See also 1 Palgrave, 5 (*de recto tenendo*); 24 P. R. S. 219 (*ne injuste vexes*).

plaintiff's introductory declaration. Since Glanvill's writs do not include a warranty of charter, that introductory declaration is our only hope, I think, of a clue to the words which our writ used. In 1198 and again in 1199 (as Richard's reign is ending) that clue is given and seems to show that our writ has reached maturity.¹¹⁶ What form it bore in earlier years we do not know.

(2) THE ACTION

The Feet of Fines confirm that the action *de warrantia cartæ* is at least as old as the year 1195. The usual recital in the fines of our period is merely that there has been an action (unspecified) between the parties about the land in question—*unde placitum fuit inter eos in prefata curia*. Not infrequently, however, it specified the action; and occasionally the action so specified was warranty of charter.¹¹⁷

Our earliest surviving plea rolls seem to show that the action is even older. In the summer of 1194, when these rolls begin, already a plaintiff is praying for his judgment *de warentia carte* in respect of land which he had lost to another in an assize of novel disseisin some years before.¹¹⁸ In the remaining five years of our period, as we have seen, this action was playing an active part in the development of the law of warranty. Its activities may be summarised, I think, by saying that it was endeavouring to assert and enforce the bond of warranty wherever the old procedure of vouching one's warrantor did not avail. One who cannot vouch,¹¹⁹ or who fears to vouch,¹²⁰ or who vouches in vain,¹²¹ may find his remedy in this action. And, like the early action of covenant for a lessee,¹²² our youthful action could even operate to compel specific performance of an undertaking to give seisin.¹²³

One further point remains. More often than not, an entry in the rolls of the King's Court '*de placito warrantie carte*' merely records that *A* essoined himself or appointed an attorney against *B*, or that *A* and *B* were assigned a day for the hearing of their case. And if we try to trace

¹¹⁶ 1 Palgrave (1198) 157—158, 168: '*quas clamat tenere de eo et unde cartam habet.*' 1 Palgrave (1199) 362, Plac. Abr. 7 (s.c.): '*Preceptum fuit . . . quam tenet et de ea clamat tenere.*'

¹¹⁷ 17 P. R. S. Nos. 43 (1195), 69 (1196), 165 (1196); 23 P. R. S. No. 171 (1198); 24 P. R. S. No. 216 (1199). In some the recital is that one of them had been summoned to court to warrant a charter to the other: 20 P. R. S. No. 39 (1196); 23 P. R. S. Nos. 52 (1197), 129 (1198). In one fine, which binds *A* not to lease to anyone but *B*, the action is said to have been based upon both warranty of charter and covenant: 23 P. R. S. No. 148 (1198). Over 900 fines are recorded for this period.

¹¹⁸ *Robert de Wudecot's Case*: 14 P. R. S. 14 (1194), read with 1 C. R. R. 197. As to this case, see further footnotes 79, 108, *ante*.

¹¹⁹ As to novel disseisin, see preceding footnote and *ante*, pp. 202, 206.

¹²⁰ *Ante*, p. 206 and footnote 107. Those entries which merely show that a defendant in action of warranty of charter came and warranted in court are probably cases of this kind: e.g., 1 Palgrave, 70 (1194), 167 (1198); also 1 Palgrave, 305, 310, with its sequel Plac. Abr. 40 (Henry de Longo Campo). So also those which resulted in a fine—see footnote 117, *ante*.

¹²¹ As to the vouchee who does not come, see § 4 and footnotes 99, 106, *ante*.

¹²² 2 Pollock and Maitland, 106. This connection between covenant and *de warrantia cartæ* is also illustrated by 23 P. R. S. No. 148, see footnote 117, *ante*.

¹²³ See *ante*, pp. 198—201, for its use where a grantee seeks to obtain seisin.

the matter further there is often nothing more.¹²⁴ In some of these cases, no doubt, the action was frustrated by a death or compromise, or its sequel was written in some roll which has not survived. But it is difficult to believe that so high a proportion of our warranty actions suffered this fate. Even when one manages to follow a pair of litigants through several stages of their litigation one does not always reach the formal decision of their problem. The final adjournment for the hearing of their judgment may be the last we hear of them; and so, as with the Year Books of a later age, we may be left to deduce the law from the manner in which they presented or argued their case.¹²⁵ This latter wastage, however, after adjournments for judgment, is not so striking as that which so frequently and inexplicably removed our litigants before their plea had really begun. The solution of that mystery, perhaps, lies somewhere in the local Courts. It may well be, for instance, that one's lord would the more readily warrant one in Shire or Court Baron, or could the more easily be persuaded to desist from harassing one, if one had the King's writ of warranty.¹²⁶

¹²⁴ 14 P. R. S. 20—21, 28; 24 P. R. S. 226; 1 Palgrave, 74, 95 (and 126), 119, 130, 239, 255, 372, 429; 1 C. R. R. 18, 22, 25, 38, 40 (*bis*), 92; 7 C. R. R. 333. In C. R. R. and some parts of Palgrave the essoins have not been printed (1 C. R. R. vii—viii). In 1 Palgrave, 85, the plea ended by failure to prosecute. In 1 Palgrave, 305, 310, it apparently ended by defendant's death and began again some years later against his heir: 2 C. R. R. 79; Plac. Abr. 40. Contrast the importunate Prioress of Clerkenwell who tried ten times at least (from 1 Palgrave, 298, 442, till 3 C. R. R. 184) to get her defendnat to court but failed.

¹²⁵ When an action *de warrantia cartæ* was related to another pending action about the same land both were usually adjourned to the same day so that both could be decided together: e.g. 1 Palgrave (1199) 355, 362 (which concluded in 1 C. R. R. 121, 125), where John Morrell was defendant in mortdancesthor and plaintiff in warranty of charter for the same land. See also 1 Palgrave (1199) 415, re Albin fitz Richard, *bis*.

¹²⁶ See footnote ¹¹³, *ante*. The entries about Eustace of Fulbourn (Cambs.) seem to support this. The only records of his plea of warranty of charter against Gilbert de Tani are their essoins: 1 Palgrave (1199) 240, 291. But a later entry shows that in fact Gilbert is his lord and that Eustace is defendant in a plea of right in Gilbert's court and has vouched Gilbert there: 2 Palgrave (1199) 95. This last entry is a writ prohibiting Gilbert from holding that plea, whether because he ought not to become defendant in his own court (cf. footnote ⁹¹, *ante*) or because, as the writ says, he is beyond the seas on the King's service, is not clear.

LIABILITY FOR CRIME

HENRY BARNES

A. INTRODUCTORY.

THE Penal Code of the Russian Socialist Federal Soviet Republic: 'Article 10. Persons who commit socially dangerous acts shall be liable to the application of measures of social defence of a judicial-correctional character only—

- (a) if they acted deliberately, *i.e.*, if they foresaw the socially dangerous consequences of their acts, or desired those consequences, or knowingly permitted them to happen, or
- (b) if they acted carelessly, *i.e.*, if they did not foresee the consequences of their acts although they ought to have foreseen them, or if they light-mindedly hoped to avert such consequences.'¹

Citing Article 10 does not mean that I hold a brief for Communism. All it means is, that as it happens, Article 10 expresses the principle which I have always advocated as the ideal during the many years I have lectured on Criminal Law in the University of Cambridge. I could not suggest that this principle is the complete basis of English Criminal Law; I have suggested, and do suggest, that it ought to be the bases of that or of any other civilized system of Criminal Law.²

Apparently, in the Soviet Code, there are no exceptions to the application of Article 10, and Article 16 provides that Article 10 shall govern any extensions of Criminal Law. A few short Articles deal with the usual exceptions to liability, such as infancy or insanity; limitation by time; and degrees of complicity.³

Article 10 is particularly interesting, because the Soviet Law is the embodiment of the theory that freedom of will is a myth, and that human behaviour is inevitably and entirely the result of conditions of birth, environment, and education. Hence, punishment as revenge or expiation is useless; and the very word 'punishment' is abolished from the Code. Measures of social protection are justified; socially dangerous persons

¹ Analytically, it is very easy to find fault with Article 10: for example, it appears to adopt Austin's definition of Intention (Lecture 19, p. 434); but, 'if they foresaw the socially dangerous consequences of their acts' and 'or if they light-mindedly hoped to avert such consequences' leave us wondering whether an act plus foresight but with no desire, is classified as Intention or Negligence. But this is mere academic quibbling; the Article furnishes a sound practical working rule.

² 'The case where an offender could neither know that his conduct was *wrong*, nor that it was *legally* punishable, will be obviously exempted from criminal liability under any but the most irrationally tyrannical government': Clark, *Analysis of Criminal Liability*, 63.

³ One reads of severe treatment of political offenders, *e.g.*, *Times*, 13 Nov., 1931. This indicates exceptional punishments rather than exceptions to the operation of Article 10. Where political education is very thorough, it is hardly possible that a citizen who expresses disagreement with the prevailing ideology should do so unintentionally.

may be eliminated; less dangerous ones must be brought under the influence of correctional labour, culture, and education, so that they may be assisted in adapting themselves to social conditions, and become stable members of society.⁴

Something similar to Article 10, but not nearly so neatly expressed, has appeared in all the recent Codes for the African Colonies and Protectorates. The 1930 Penal Code for Kenya, for example, by s. 10 enacts, 'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.' The older Codes, based upon English Law, such as the Indian Penal Code,⁵ or the Criminal Code of Canada, do not expressly define the mental element in crime, but deal with it in relation to the Sections. Sir Hari Singh Gour, in commenting on sect. 26 of the Indian Penal Code, is able to say that guilty knowledge is essential to prove all guilt; but, where a section provides for a special intent, the burden of proof of that intent is on the prosecution; where reference to the state of mind is omitted in a section, guilty intent will be presumed, unless its absence is established by the defence. It must always be there, but the burden of proof differs.⁶ Commenting on sect. 279, Gour discusses 'culpable rashness' and 'culpable negligence';⁷ these are conceptions which I shall deal with later.

Gour,⁸ and every other writer on these Penal Codes that I have read, admit the possibility of the Legislature creating a crime on the Fact (*actus reus*) alone; but seem particularly grateful that so far they have escaped it. Books for instruction of magistrates anticipate it.⁹

English Criminal Law has no official definition of what is necessary for liability for crime: or of the meaning of what is conveniently called '*mens rea*,' but its various meanings can be gathered from scores of cases. The practitioners' text-books¹⁰ give a meagre description of it, and deal with it specifically in relation to each crime. Clark¹¹ and Stroud¹² have published treatises on, and Kenny¹³ a careful analysis of, what each believes to be the basis of liability. Much else has been written,¹⁴ and with little agreement. The truth is, as Holmes says,

⁴ Murphy, *Russian Prisons*, 1, 8; McConnell, *Criminal Responsibility and Social Constraint*, 82; Sen, *From Punishment to Prevention*, 27; Morris, *Criminology*, 492; Calvert, *The Lawbreaker*, 9.

⁵ One would have expected some such section in this Code, considering its philosophical and legal origin: 11, Holdsworth, *History of English Law*, 225.

⁶ Gour, *Penal Code of India*, 177. A very salutary rule, but not always followed in English cases: *Hewart L.C.J. in Chajutin v. Whitehead* (1938) *Times*, 13 Jan.

⁷ Gour, 888.

⁸ Gour, 177, and notes 6, 7 and 8. Canada, *Baldwin v. Snook* (1918) 40 D. L. R. 333. Australia, *Moffat v. Hassett* (1907) V. L. R. 515.

⁹ Sir Alison Russell, *The Magistrate*, 10.

¹⁰ Archbold, Stone, Roscoe, Halsbury, Russell, and the older books.

¹¹ *Analysis of Criminal Liability*.

¹² *Mens Rea*.

¹³ *Outlines of Criminal Law*, 14th edition, Chapter III.

¹⁴ Some of the more recent articles are by Stallybrass, 52 L. Q. R. 205. Turner, 5 C. L. J. 61; 6 C. L. J. 31. Jackson, 6 C. L. J. 83. Levitt, 17 Illinois L. R. 578. Sayre, 45 Harvard L. R. 974. Perkins, 52 Harvard L. R. 905. Borchard, 52 Yale L. J. 477.

'that the law is always approaching, and never reaching, consistency. . . . It will become entirely consistent only when it ceases to grow.'¹⁵ I feel, therefore, somewhat justified in attempting to analyze present tendencies in the doctrine of liability for crime; but I shall suggest what I think English Criminal Law ought to be, as well as trying to state, as accurately as I can, what I think it is.¹⁶

I shall use simple terms throughout, and only with certain definite meanings.¹⁷ ACTUS REUS or FACT for the physical act or omission; this is always essential for liability.¹⁸ For the inchoate crimes, attempt, conspiracy, and incitement, the criminal is really punished for his intention, but there must be some physical proximate act as evidence of the intention.¹⁹ By VOLITION I shall mean that the mind was in control of the body while committing the Fact: 'a spasm is not an act';²⁰ and without Volition there can be no liability in English Law, Criminal or Civil.²¹ MENS REA:—*Actus non facit reum, nisi mens sit rea*. The maxim is not at all translatable so as to express all that it has come to mean; one might render it—the physical act does not make the actor guilty unless his state of mind is one of those states to which the law attaches responsibility;—perhaps the word BLAMEWORTHINESS expresses the numerous varieties of such states of mind as well as any.²² I shall use the term *mens rea* in the wide sense of blameworthiness.

Mens Rea will include three definite types. (i) INTENTION; which implies deliberation upon motives,²³ a choice of conduct, initiation of Volition,²⁴ and a desire for the intended result.²⁵ The mind sees the Fact, and desires it.²⁵ Intention does not involve premeditation, it can occur in a crime such as murder as quickly as a business executive would

¹⁵ Holmes, Common Law, 36. (Not necessarily so. Soviet Law seems to have reached consistency, and has provided for growth.)

¹⁶ This is not meant to be controversial, but to discuss various viewpoints which the student can follow up.

¹⁷ 'If the different states of criminal consciousness can be designated by different terms, there can be no benefit in confusing them by the misuse of a word clearly enough understood in ordinary parlance.' Clark, 79. Probably no one will agree with my use of terms, but I like them. They are simple and convey the idea simply. Compare Stroud, 6: 'Full Intention' and 'Imperfect Intention': and Austin, Lecture 19.

¹⁸ 'Imagining' the death of the king was not successfully established as a crime by the Statute of Treasons, 1351. Intention, even though known, is not criminal, *Landon* (1913) 29 T. L. R. 375. We all have *mens rea*, but most of us get a grip on ourselves. Only those who let themselves go are criminals.

¹⁹ Austin, Lecture 21, p. 454.

²⁰ Holmes, C. L. 54.

²¹ 2 St. Hist. 100. Sleepwalking case, 1 Journal of Criminal Law, 46. Many writers use 'Involuntary' and 'Voluntary' to express Volition; I prefer Volition as Clark uses it: Clark, 22.

²² 8 Hold. H. 434; 2 St. Hist. 94; Sayre, 45 H. L. R. 1025; 1 Blake Odgers, Common Law, 120.

²³ 2 St. Hist. 110.

²⁴ Stephen, General View of the Criminal Law, 77.

²⁵ Clark, 73. Whether or not Intention could include an intent to commit a legal wrong, and the wrong turns out to be a crime, as Kenny, Stroud, and many judges, have thought, I shall discuss later when dealing with *Prince* (1875). It is said in the 4 Report Criminal Law Commissioners, 15, 'the intention to do the act exists for all criminal purposes where it is wilfully done, although the act itself was merely intended as a means of obtaining some ulterior object.'

make a decision. Intention is essential in many crimes.²⁶ Quite often a particular intent is part of the definition of a crime,²⁷ and in all such cases the prosecution has the burden of proving it. (ii) AWARENESS, I shall call this, for lack of a better name.²⁸ It is a sort of half-way house between Intention and Negligence. It consists in actual foresight of the possible consequences of a Fact, making a choice of conduct, and deciding to take the risk. It differs from Intention in that there is no desire for the consequences, although there is full knowledge of the chances of their occurring.²⁹ It is the *foresight* that matters, therefore it makes no difference whether the Fact were being done intentionally or negligently. An excellent example of this state of mind is seen in a case³⁰ where a rick of hay, put up damp, had heated, taken fire spontaneously, and some cottages were burnt: there had been a discussion, repeated warnings as to the danger, and the defendant had said he would 'chance it.' Another good example occurs in the crime of arson: Negligence alone can never be a sufficient mental basis for arson; there must be either Intention or Awareness.³¹ (iii) NEGLIGENCE; that is the lack of that care or skill which a person of reasonable ability and prudence would have shown under the same circumstances; taking into account the customs and conventions of ordinary social and business life.³² There is no foresight of the harmful consequences; the whole gist of negligence is that the accused failed to foresee the results that a reasonable person would have foreseen.³³ The view has been emphatically stated³⁴ that there is no criminal liability for negligence unless there was foresight of the consequences.³⁵ I think that this view is mistaken; and I shall endeavour to prove that negligence does often affect liability for crime in modern law; and that modern criminal legislation is insistently bringing negligence more and more pertinently to the front.³⁶

The word MALICE is now almost impossible of definition owing to the

²⁶ *E.g.*, Assault, Battery, Mayhem, Rape: Burglary, Larceny, Receiving, all the Fraud group of crimes: Malicious Damage: Attempt at any crime: probably all crimes of an infant between 8 and 14 years.

²⁷ *E.g.* Burglary: Larceny: the felony of Wounding. Clark, 81 to 93.

²⁸ Gour calls it 'culpable rashness': Gour, 888.

²⁹ Markby, Elements of Law, 119.

³⁰ *Vaughan v. Menlove* (1837) 3 Bing. N. Cas. 468.

³¹ *Child* (1871) 1 C. C. R. 307; *Nattrass* (1882) 15 Cox, 73; *Harris and Atkins* (1882) 15 Cox, 75; *Faulkner* (1876) 11 I. R. C. L. 8.

³² Stroud, 11.

³³ Perhaps I should mention here that 'for purposes of the Criminal Law there are degrees of Negligence': Lord Atkin, in *Andrews* (1938) 26 C. A. R. at p. 47.

³⁴ Turner, 5 C. L. J. 64—65; 6 C. L. J. 32, 36, 38, 42, 39, 45, 46, 50. These seem to conflict with 5 C. L. J. 61, 'that he clearly did foresee or that any ordinary person in the circumstances could not, in the opinion of the jury, fail to foresee'; and on p. 69 and p. 72, 'must be deemed to have realized.'

³⁵ I prefer the view taken by Austin that where there is foresight it is not negligence at all. Also Ewing, *The Morality of Punishment*, 54, 'Carelessness is more dangerous to society than criminal propensities (being much more widespread) and ought to be punished accordingly.' See Clark, 54 and Findlay J. in *Davis & Wife* (1937) *Times*, 4, 5, 6 May, a conviction for manslaughter by gross negligence, but there was no foresight.

³⁶ *E.g.*, Food and Drugs Act, 1938, s. 9, (3): 'or he did not know, and could not with reasonable diligence have ascertained.' There are many recent statutes so worded; the effect is to put on the defence the burden of proving that there was no negligence.

many different meanings given to it by judges and writers. Bayley J.: 'Malice, in common acceptation, means ill will against a person; but in its legal sense, it means a wrongful act, done intentionally and without just cause or excuse.'³⁷ Stephen J. seems to make it interchangeable with Intention.³⁸ Blackburn J.: 'A man acts maliciously when he wilfully does that which he knows will injure another in person or property';³⁹ and, 'when he wilfully does an unlawful act without lawful excuse';⁴⁰ but he goes on to suggest that Awareness might constitute malice. But this was carried much farther by Coleridge C. J.:⁴¹ 'The prisoner must be taken to have intended the natural consequences of that which he did. He acted "unlawfully and maliciously," not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure': and Stephen J. added: 'If the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse he did it "wilfully," that is "maliciously."'

MALICE is used in at least three senses. (i) 'A wrong feeling in a man's mind';⁴² that is a bad motive as well as intention. (ii) Malice aforethought; the technical expression used in murder. (iii) Malice under the Malicious Injury to Property Act, 1861; here Malice means an intention to injure the property in question.⁴³ It follows that where the Fact was done negligently, the accused would have a perfect defence: 'although carelessness may amount to *mens rea*, it cannot be malicious.'⁴⁴

QUASI-CRIME.—I mean by this that when a perfectly innocent person has been convicted of a crime, the conviction was due to the Legislature having defined that crime in such a way as completely to exclude *mens rea*; and the statute (or Order) was also so worded as to exclude the possibility of the Court importing *mens rea* into the definition of the crime.⁴⁵ It is convenient to include under Quasi-crime the presumption that 'All men know the law'; from which comes the proposition that mistake of law is no defence. The result to the victim is the same, in whichever way the quasi-crime may arise.⁴⁶ But writers are much inclined to distinguish between them.⁴⁷

I did not invent the term 'Quasi-Crime,' there is plenty of authority

³⁷ *Bromage v. Prosser* (1825) 4 B. & C. 247.

³⁸ St. Gen. View, 81.

³⁹ *Ward* (1872) 1 C. C. R. at p. 360.

⁴⁰ *Pembliton* (1874) 2 C. C. R. 119.

⁴¹ *Martin* (1882) 8 Q. B. D. 54.

⁴² Brett L. J. in *Clark v. Molyneux* (1877) 3 Q. B. D. at p. 247.

⁴³ *Roper v. Knott* [1898] 1 Q. B. 871. 'Wilful' and 'Intentional' are synonymous: *Rudd v. Elder Dempster & Co., Ltd.* [1933] 1 K. B. 566.

⁴⁴ 1 Odgers, Common Law, 123.

⁴⁵ As was done in *Tolson* (1889) 23 Q. B. D. 168.

⁴⁶ *Chajutin v. Whitehead* [1938] 1 K. B. 506; 31 Cox, 28; 107 L. J. K. B. 273; 158 L. T. 277; 54 T. L. R. 327; 102 J. P. 117; 1 All E. R. 159; 82 Sol. J. 175; 36 L. G. R. 187, and *Sorsky & others* (1944) 30 C. A. R. 84. I particularly give all these references because I want it to be seen how notorious these appealed Quasi-crime cases are; it is rare that they are reported in less than seven reports.

⁴⁷ Jenks, Book of English Law, 195; Wood & Waite, Crime and its Treatment, 305.

for it.⁴⁸ Recently, in distinguishing quasi-crime from crime, a writer⁴⁹ called it 'Public Tort' or 'Civil Offence.' These terms are scarcely suitable; the first does not fit in with any definition of tort, and the second does not fit in with the fact that the case is tried in the criminal courts. It has also been recently suggested⁵⁰ that 'police power measures carrying a penalty' should no longer be classified or tried as crimes: apparently a change in the constitution is suggested, to bring them into administrative civil law.⁵¹ On the analogy of Quasi-Contract and Quasi-Tort, it would seem better to refer to the type of crime in which the distinguishing element of real crime is left out, as Quasi-Crime. In contract and in tort the real issue is to decide which party is to bear the loss, to pay the damages: and Quasi-Contract and Quasi-Tort serve an extraordinarily useful purpose in doing justice.⁵² In criminal law the real issue is social protection, or punishment, or both; and it matters not which, for neither of them can be served by convicting those who could not possibly have anticipated their liability. There is a real purpose in trying to find a workable distinction, because statutes have not created Quasi-Crimes to the extent we are asked to believe.⁵³ When distinguished, Crime would always require *mens rea* of some appropriate type; Quasi-Crime would be rationalized, by being gradually eliminated by Statute and re-enacted as Crime. Ten years ago a serious warning on this matter was sounded to the legislators, 'to prevent unnecessary injustices being committed.'⁵⁴ The warning must have reached them; the elimination process has set in, and, in fact, has already reached considerable proportions.⁵⁵ Let us have a criminal law for criminals, not for honest and careful men.

B. THE HISTORY OF MENS REA.—*Mens rea* might be better described as a product of psychology than of historical evolution; an example of

⁴⁸ Channell J. in *Pearks, Gunston & Tee Ltd. v. Ward* [1902] 2 K. B. at p. 11; cited by Lord Reading C.J. in *Moussell Bros. Ltd. v. L. & N. W. R. Co.* [1917] at p. 845; 9 Hals. 11; 8 Hals. Stat. 843; Stroud, 11, 39, 224.

⁴⁹ Perkins 52 H. L. J. 905.

⁵⁰ Borchard 52 Yale L. J. 493.

⁵¹ It would hardly be applicable to Mistake of Law in England where some types of bigamy may be in the Quasi-crime group.

⁵² Winfield, Tort, 8, 699; Province of the Law of Tort, 119; Jackson, History of Quasi-Contract; Cheshire and Fifoot, Contract, 413; Salmond, Torts, 12.

⁵³ Jackson, 6 C. L. J. 83.

⁵⁴ Stallybrass, 52 L. Q. R. 66—67.

⁵⁵ *E.g.*, a very notorious case will not happen again; *Laird v. Dobell* [1906] 1 K. B. 131; for the Act of 1893 is repealed, and the Fertilisers and Feeding Stuffs Act, 1926, s. 7 (1), enacts, 'unless he proves that he did not know and could not with reasonable care have known that the article contained,' etc. The same applies to *Bishop* (1880) 5 Q. B. D. 259, tried by Stephen J.; the Act was repealed and re-enacted with safeguards. As to the cases on food and drugs, 'selling to the prejudice of the purchaser,' this is now the law in the Food and Drugs Act, 1938, s. 3, and six defences are set out in s. 4. A large number of cases against publicans are wiped out by the Licensing Act, 1910, s. 75 (3), 'it shall lie on the holder of the licence to prove . . . took all reasonable steps for preventing drunkenness'; and s. 78 (a), 'knowingly harbour or knowingly suffer to remain'; (b) 'supply any liquor or refreshment'; the burden of proof in (a) is on the prosecution, in (b) on the defence; see 9 Hals. Stat. 1029.

Once in a while it goes the other way: the Food and Drugs Act, 1938, s. 1, leaves out the words 'that he did not know and could not with reasonable care have known' that were in sect. 1 of the Food and Drugs Act, 1928.

man's inherent sense of justice. A child of very tender years, who has harmed someone accidentally, expects to be forgiven at once because, 'I did not mean it.' As Holmes says, 'Even a dog distinguishes between being stumbled over and being kicked':⁵⁶ a child will suffer quietly an accidental hurt: will take punishment for wrong-doing manfully; but will resent with white-hot intensity punishment when innocent.⁵⁷ Perhaps it is because *mens rea* is so obvious a conception that we find it so little mentioned in legal history.

Primitive law does not seem to have paid much attention to fault. Injury, right to retaliate⁵⁸—vengeance legally depending in measure on the impulse of the injured person, and buying off the vengeance, was the routine procedure. However Roman Law may have started,⁵⁹ its development was not of a kind that would emphasize Criminal Law.⁶⁰ Some thought was given to *mens rea*; the Roman definition of theft certainly included a mental element. The Criminal Law of Greece was more like a modern system, as we should expect from a race of philosophers.⁶¹ There are many references in Greek literature to a mental element, Aristotle says,⁶² for example, 'Accidents are happenings which are unexpected, and do not arise from wickedness.' Negligence and accident were distinguished.⁶³ Many of the ancient systems of law were harsh; the Hammurabi and Jewish Codes are about average examples; but some of the most ancient of all were not harsh. It appears as though civilized ideas may run in cycles. The Laws of Manu-Samhita say 'Punishing unjustly in this world ruins reputation and destroys fame':⁶⁴ 'The King shall ordain punishment to offenders according to the merits of each case and after having carefully examined it with special reference to the place and time (of commission) and the capacity and knowledge of the offender.'⁶⁵ The Brehon Laws of Ireland recognize Motive, Intention, Negligence, and method, in fixing the compensation to be paid; they set a fine on Intention: and they distinguish crimes from torts.

The people who settled in England after the Romans left brought ideas about wrongs that were more primitive than the Hammurabi Code. A great deal may be gathered from the Anglo-Saxon Codes;⁶⁶ but, by the time they began to appear, the idea was emerging that unlimited private vengeance and blood-feuds must be restricted by the State, which could not afford internal private wars. A really important forward

⁵⁶ Common Law, 3.

⁵⁷ Ward, *Psychology Applied to Education*, 135; McDougall, *Social Psychology*, 140.

⁵⁸ Maine, *Ancient Law*, 389; Ruxton, *Maliki Law*, 311: a fine example—

'Blood for blood, and blow for blow,
Thou shalt reap as thou didst sow.'

⁵⁹ Holmes, *Common Law*, 3.

⁶⁰ Strahan-Davidson, I, *Problems of the Roman Criminal Law*, 102; Poste, *Gaius*, 16.

⁶¹ Maine, *Ancient Law*, 390.

⁶² *Rhetoric*, I, xiii, 16.

⁶³ Vinogradoff, *Historical Jurisprudence*, 182—188.

⁶⁴ Manu, c. 8, v. 128.

⁶⁵ Manu, c. 7, v. 16.

⁶⁶ Thorpe, *Ancient Laws and Institutes of England*.

step is taken, the penalty for wrongs is classified: Wer, the compensation, Bot, the price of the injury, and Wite, the fine to the king, for punishment.⁶⁷ Failure to pay the penalties entailed death, mutilation, or sale into slavery. With the return of Christianity, the Church used its influence to enforce the system of penalties.

Under Anglo-Saxon and Norman Laws there was no particular need for a doctrine of *mens rea* to be formulated. Criminals caught in the act of committing Treason, Arson, Housebreaking, and open Theft, were liable to summary execution by the captor: in the later Codes there is a right of redeeming by Wer, but apparently at the discretion of the captor. Those criminals who had to be tried were tried by Ordeal, Oath Helping, or Battle: the idea is the same in all three methods of trial, God will intervene to protect innocence. No conception of *mens rea* is needed for the Court's part in the trial: God tries the accused; and God knows the truth.⁶⁸ Henry II greatly extended trial by 'the judgment of God.'⁶⁹

It will not be until men have to sit on petty juries, and hear and weigh evidence, that they will begin to think of the moral side of Criminal Law.⁷⁰ Stephen J. says that the first use in English Law that he can find of the *mens rea* maxim is in the *Leges Henrici Primi*, v. 28.⁷¹ But this reference only applied to Perjury; and Maitland has traced it to St. Augustine.⁷² Holdsworth emphasizes the early principle of liability, the feelings of the injured party are the measure of compensation: but after Tort provides damages, and Tort and Crime separate, criminal liability on the basis of moral delinquency will have room to develop.⁷³ Then the canonist will describe the circumstances under which moral guilt is imputable, the Court will say when a definite offence has been committed. Bracton stressed the moral guilt,⁷⁴ and excused the infant and lunatic. The King's justices took over the trial of felonies; and felonies were increased on technical and political as well as on moral grounds: 'then as now it is not only the *mens rea* but also legal logic and public policy which is at the bottom of our doctrine of criminal liability.'⁷⁵ It is the presence or absence of intent that marks off felony from trespass.⁷⁶ And as the Law of Evidence is built up, *mens rea* is presumed from failure to do what the man of ordinary ability would have done in the same circumstances; but this is evidence only, not conclusive proof. During the Middle Ages the need for a *mens rea* had been grasped. By

⁶⁷ 1 Thorpe, 85.

⁶⁸ Perhaps those who condemn these old methods of trial are crediting men of Saxon England with their own sceptical lack of faith: they disregard God's judgment, and suggest an unfair trial. Apart from the psychology side, I prefer to think that Englishmen believed in their methods of trial, and carried them through with their accustomed judicial fairness. I should have liked to have seen Mlle. Larssonneur tried by ordeal, 24 C. A. R. 74.

⁶⁹ Assize of Clarendon, 1166, 2 P. & M. 454.

⁷⁰ I am afraid this is pure speculation; I have no authority for it.

⁷¹ *Tolson* (1889) 23 Q. B. D. 185—187.

⁷² 2 P. & M. 476.

⁷³ 2 Holds. Hist., 43—54.

⁷⁴ Bracton, f. 136.

⁷⁵ Holmes, Common Law, 38.

⁷⁶ 3 Holds., 374.

1700 the nature of *mens rea* had been analyzed; the law of incapacity, and of defences, had been clarified. There is speculation about the nature of guilty intent, 'it is different in different classes of crimes.'⁷⁷ Public policy, and the difficulty of proving intent, had made it necessary to rule that the doing of certain acts is to be evidence of guilty intent. *Mens rea* still meant moral blameworthiness, but it had become a very technical idea, connoting different shades of guilt. Murder or manslaughter often depend upon the degree of carelessness shown.⁷⁸ The canonical idea of liability acquitted one who slew another by misadventure only when the act causing the death was lawful.⁷⁹ Technical as it became, the natural meaning of *mens rea* was never lost, and the general principle that it must be present in some form had been the incentive which caused the defences to criminal liability to be evolved.

Many writers maintain that the object of Criminal Law is punishment.⁸⁰ The theological element in mediæval belief is well shown in the form of indictments, 'Not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil.'⁸¹ But the philosophers of the eighteenth century would have none of this; they believed in free will, free choice of evil for the sake of the pleasure it gave, and punishment was because of the vicious will. The objects of punishment were Revenge and Deterrence; more modern ideas have added Reformation. The *mens rea* required has been described by numerous judges and writers; but a few extracts will accurately express the prevailing idea. 'Means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes.' 'In some cases it denotes mere inattention.' 'A mind which is guilty of inattention, by not thinking of a particular matter when it ought, may well be described as a guilty mind, or a mind at fault.'⁸² 'Since the purpose of the law is primarily punishment, courts have consistently held the law not to be applicable to anyone unless that person has demonstrated a punishability of mind. As a mere matter of common sense, punishability presupposes some consciousness of wrongdoing on the part of the actor. And this is so whether the purpose of the punishment be revenge or deterrence. There is no call for revenge upon a person who intended no harm, who in fact had no realization that he might cause injury. On the other hand, no man can be deterred from an act by threat of punishment if he does not know that he is doing something for which he may be punished.'⁸³ Only this week, in writing to a great philosopher, I mentioned, 'I am trying to write something on *Actus non*

⁷⁷ 8 Holds. 434.

⁷⁹ 2 P. & M. 477.

⁸⁰ E.g., Clark, Stephen, Kenny, Stroud, Odgers, Pound, Wood and Waite.

⁸¹ See North Carolina State Constitution, 1862, 'To know the right but still the wrong to pursue proceeds from a perverse will brought about by the seductions of the evil one.'

⁸² 2 St. Hist. 94 *et seq.*; and Tolson (1889) 23 Q. B. D. 185-187.

⁸³ Wood and Waite: (1941) Crime and its Treatment, 365.

⁷⁸ Foster, Crown Law, 262.

facit reum, nisi mens sit rea: he replied, 'I cannot think what you can find to write about on the maxim, it is the most self-evident proposition I have ever seen.'

Religion, Philosophy, and Common Law until about 1843,⁸⁴ made liability depend on the evil will.⁸⁵ The modern development of Criminal Law has forced us to drop the word 'evil.' Its development has been very different from that of the Law of Tort or of Contract. Since the Star Chamber was abolished in 1640, the development of Criminal Law has been by Legislation and Delegated Legislation.⁸⁶ Common Law has sometimes recognized new methods of committing old crimes⁸⁷; but it has not created new crimes. It is rather a pity, because crime-making by Statutes and Orders has become a convenient habit. Politicians and administrators have discovered the Criminal Law. It is difficult to picture the spirit of justice as a hand-maiden to bureaucracy.

However, we can move with the times.⁸⁸ If we are prepared to accept that the object of Criminal Law is social protection; that environment and education explain serious crime more aptly than the existence of vicious wills; that there must be some simpler test of *mens rea* for the person lost in the labyrinth of statutes; then we can justify adopting the test of knowingly breaking the law.⁸⁹ An intention to break the law would not be quite enough: better would it be to say that knowledge, or neglect of the means of knowledge, that the Fact is against the law, should be necessary for all criminal liability. Motives and morals go out of the picture. We must, however, distinguish Quasi-Crime, before we adopt this test of *mens rea*⁹⁰; because it requires neither *mens rea* nor negligence.^{90a}

Except one,⁹¹ all the text-books in general use have ignored this viewpoint about *mens rea*; and have published in edition after edition the explanations of *mens rea* they have always used; usually with something said about Quasi-Crime.⁹²

⁸⁴ Tobacco Act, 1843, s. 3; and Woodrow (1846) 15 M. & W. 404.

⁸⁵ 4 Bl. Comm. is a good example of the thought of the time; every crime involved moral guilt. See 12 Holds. 734, on Blackstone; he praises him very highly.

⁸⁶ Compare the indices to Statutes; Archbold (indictable offences), 34 double-column pages of fine print; Stone, 143 double-column; Clerk and Lindsell, Torts, 10 pages; Addison, Contract, 13 pages.

⁸⁷ *Basssey* (1931) 22 C. A. R. 160; *Manley* (1933) 24 C. A. R. 25; *Joyce* [1946] 1 All E. R. 186.

⁸⁸ Some of us reluctantly; see Hewart, New Despotism.

⁸⁹ Sayre, 45 Har. L. R. 1019: he says at p. 1025, '*mens rea* can never be analyzed into any single constituent element.' See Sharman J. in 21 C. A. R. at p. 135; Stallybrass, 52 L. Q. R. 64; Perkins, 52 Har. L. R. 908. Perkins suggests that all crimes require *mens rea*, the common ingredient in all is 'X'; and some crimes require X plus some other element; but he does not explain what 'X' is. See also Turner, 6 C. L. J. 35; Jackson, 6 C. L. J. 92; citing Ivory J.

⁹⁰ And I prefer to take it in all crime that accused not only intended to break the law, but knew or ought to have known that he was breaking the law: that is, I include Mistakes of Law under the heading of Quasi-crime.

^{90a} See note 46, *ante*, p. 214.

⁹¹ Kenny, Outlines of Criminal Law; I rather regret the learned editor's alterations. Right or wrong, Kenny's very well argued analysis of liability was that of a great moralist; and it is worthy of an undisturbed place in legal literature.

⁹² Archbold, 20, 21, 882; Stone, 206—207; and he makes a generalization on Quasi-crime from only four cases; 9 Halsbury, 10, 11, 15, 16, 441—445; Russell, 44, 1332;

C.—THE HISTORY OF NEGLIGENCE in English Law is interesting, and has brought about some strange results. There is astoundingly little about Negligence in early English Law. As to civil liability, up till the end of the Middle Ages the principle was that a man was liable for the harm done by his acts, if it came within the forms of action, whether it were done intentionally, negligently, or accidentally. A man acts at his peril; so negligence is not material.⁹³ Littleton said: 'the law is the same for small things as for great, and according to the extent of his trespass he must pay damages.'⁹⁴ Liability for innocent dealing with another's property has come down to our own time; and it is not always a satisfactory explanation to say that the party was negligent in not finding out his lack of right.⁹⁵ The decision in *Rylands v. Fletcher*⁹⁶ seems to be based on the mediæval notion of liability. The notion of Negligence probably grew up through actions on the Case for malfeasance, misfeasance, and non-feasance against smiths, innkeepers, carriers, doctors, and such professional and skilled people, for lack of due care.⁹⁷ The standard of care would suggest itself naturally, the standard of the average skilled man in the trade.⁹⁸

The transition from Negligence in a public calling to Negligence in the ordinary affairs of life came so quietly as to attract little attention. There is an anonymous case in 1338,⁹⁹ a duty to fence land, failure to do so (i.e., non-feasance), cattle strayed and did damage, action on the case allowed. In 1686 a defendant was held liable for bringing a wild horse into Lincoln's Inn Fields, to break it in, and the horse injured someone.¹⁰⁰ By 1700 the judges were taking a lot of notice of negligence; and in *Coggs v. Bernard* (1703),¹⁰¹ extending negligence to bailments, it got a thorough discussion. It appears to have been in this case that the idea of degrees of negligence was introduced.¹⁰² The action on the Case for Negligence appears in Comyns' Digest (1762—67). From that time negligence took a more and more prominent place in the Law of Tort; but clearer ideas about it appeared from 1825 onwards.¹⁰³ Negligence is now generally accepted as a tort, that is a breach of a duty established by law;^{103a} but it is a question whether there is a general liability for negligence, or whether it is confined to a group of dangerous acts to which the Courts or Legislature may add others.¹⁰⁴ Negligence is recognized

Moriarty, Police Law, 3, 4; Wigram, Justice's Note Book, 228, 383; Harris, 18—22; 1 Bishop, Criminal Law, 187. I have not found that practitioners are given to much speculation, they stick to the text-books.

⁹³ 3 Holds. 375; 2 P. & M. 475. See argument for plaintiff in *Stanley v. Powell* [1891] 1 Q. B. 86.

⁹⁵ *Hollins v. Fowler* (1875) 7 H. L. 757.

⁹⁴ (1868) 3 H. L. 330.

⁹⁷ Ames, Lectures on Legal History, 131.

⁹⁸ 8 Holds. 450.

⁹⁹ 1 Rolle Abr. 105, pl. 12. Also similar case, 1674, 1 Vent. 264; 8 Holds. 452.

¹⁰⁰ *Mitchil v. Alestree* (1686) 1 Vent. 295.

¹⁰¹ 2 Ld. Raym. 909.

¹⁰² Sir Wm. Jones, Bailment, 2nd ed.; Story, Bailments, § 23; Street, 1 Foundation of Legal Liability, 98 (this very excellent book gives much of the history of negligence in detail).

¹⁰³ Winfield, Tort, 426.

^{103a} Buckland, in Reflections on Jurisprudence, 110—115, cogently argues that the alleged duty to take care in the law of tort is non-existent.

¹⁰⁴ *Donoghue v. Stevenson* [1932] A. C. 562; Companies Act, 1939, s. 37. See Winfield, Tort, 424 et seq., for a thorough discussion of the subject.

as a basis of liability in all torts against person or property of which it could be a cause; and this covers a very large part of the Law of Tort.¹⁰⁵

All this is extremely pertinent to the question of Negligence in Criminal Law. It is a startling thing to the student to discover that if one, whilst driving a motor car, runs a man down and kills him, he can be liable for manslaughter on negligence; but if he runs a man down and seriously injures him, though not fatally, he is only liable for Dangerous Driving. There is nothing in the Offences against the Person Act and the Malicious Damage to Property Act, of 1861, to cover injuries caused by negligence. Section after section uses the terms 'unlawfully and maliciously' or 'wilfully,' or some such words excluding negligence. Even sect. 35 of the Offences against the Person Act, on dangerous driving, uses the words 'wanton or furious driving,' 'wilful neglect.' The Indian Penal Code, passed in 1860, contains adequate provision for negligent injuries in sects. 279, 304a, and 336—338. I know of no Dominion or Colonial Code which has not made such provision.¹⁰⁶

The Indian Penal Code created a new Criminal Law for India; and the draftsmen had a very wide discretion in gathering their law from all sources, and in incorporating modern legal and philosophical conceptions.¹⁰⁷ These included provisions for crimes committed through negligence. Presumably the draftsmen of the Offences against the Person Act and the Malicious Damage to Property Act, 1861, had no such discretion. Very many deliberate and malicious injuries had been covered by statutes before the conception of Negligence had reached recognizable proportions in the Law of Tort;¹⁰⁸ and the draftsmen of the 1861 Acts, as well as codifying these earlier Acts, introduced the 'unlawful and malicious' element into all the new crimes they created. It is a serious gap in the English Criminal Law, and well merits legislation.¹⁰⁹

Negligence, however, has a very pertinent place in the Criminal Law. Motor cars, for example, have come into the scheme of things since the time when the doctrine of negligence had been clearly defined in the Law of Tort. A man may intentionally drive in such a manner as to make him liable for Dangerous Driving or Careless Driving under sect. 11 or sect. 12 of the Road Traffic Act, 1930; but he would be more appropriately charged under the Offences against the Person Act, 1861, s. 35,¹¹⁰ if he caused any injury to any person. The great bulk of convictions under the Road Traffic Acts are for negligent acts.¹¹¹ And the fact that accused can be acquitted of manslaughter for lack of gross negligence, and yet convicted of Dangerous Driving under sect. 11,

¹⁰⁵ 8 Holds. 458.

¹⁰⁶ See Canadian Crim. Code, ss. 284, 285.

¹⁰⁷ 11 Holds. 325—326.

¹⁰⁸ *E.g.*, see Radzinowicz, *The Waltham Black Act*, 9 C. L. J. 56.

¹⁰⁹ Beven, *Negligence*, 5, where a lot is made of the Criminal Law only intervening where life or limb (?) is endangered, and other negligent acts are left to actions by the injured party. I might comment that very many negligent people are not worth suing.

¹¹⁰ *Crowden* (1911) 6 C. A. R. 190.

¹¹¹ See Clark, *Analysis*, 54, where he describes negligence very well.

proves that the negligence required for the latter offence is of a lesser degree:^{111a} *i.e.*, measured by the Reasonable Man Standard, as in Tort. Sects. 11 and 12 really create specific offences of negligence in the abstract, for no person or property need be endangered; it is the potential danger that matters; Criminal Law is preventive as well as punitive.¹¹² Also, Negligence, or some blameworthiness, is necessary under sect. 11; because it has been held that a mere error of judgment is not sufficient for conviction.¹¹³

Negligence has taken a prominent place in criminal cases prosecuted under statutes not so worded as definitely to exclude the necessity for *mens rea*, when the Courts were looking for a ground of liability. In one such case, Cockburn C.J. said, 'A man may be said to "suffer" a thing to be done when it is done through his negligence.'¹¹⁴ Lack of negligence has often been recognized as an effective defence: as far back as 1847 we find in the Statute creating the crime of having a chimney on fire, 'shall not be incurred if such person prove . . . that such fire was in no wise owing to omission, neglect, or carelessness, of himself or servant.'¹¹⁵

Contributory negligence is no defence in criminal cases:¹¹⁶ but it may mitigate punishment.¹¹⁷

Negligence can only exist in relation to a duty to take the care required¹¹⁸ in any particular circumstances; and that duty must be owed to the injured party. The duty may arise by, (i) Law: as in the use of highways; or handling of firearms; in fact, with reference to negligent acts imperilling human life, the law always imposes a duty to take care: but there is no such duty concerning omissions.¹¹⁹ The reason is that the party has taken no duty on himself, and the law has not seen fit to impose one. A fine example of advanced law in this connection is in the Polish Criminal Code of 1932;¹²⁰ 'whoever shall fail to aid another man who is in direct danger of life, having the power to act without exposing himself and his near relatives to personal danger, is liable to imprisonment, etc.' (ii) Status: that is parent and child¹²¹. (iii) Contract: such as doctor and patient.¹²² (iv) Voluntary Undertaking: where the party took the duty on himself gratuitously.¹²³

^{111a} See note ³³, *ante*, p. 213.

¹¹² *Kingham v. Seager* [1938] 1 K. B. 397.

¹¹⁴ *Bosley v. Davies* (1875) 1 Q. B. at p. 87.

¹¹³ *Howell* (1938) 27 C. A. R. 5.

¹¹⁵ Town Police Clauses Act, 1847, s. 31. The Food Standards (General Provisions) Order, 1944, s. 4, 'proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence.' A good example of the type of clause frequently met with in recent Statutes and Orders.

¹¹⁶ *Swindall & Osborne* (1846) 2 C. & K. 230.

¹¹⁷ *Stubbs* (1913) 8 C. A. R. 238.

¹¹⁸ Lord Hewart C.J., 'The underlying basis of the doctrine or theory is, on the one hand, duty, on the other hand, the supposed behaviour of the reasonable man': 1 Journal of Criminal Law, 544.

¹¹⁹ In *Paine* (1880) *Times*, 25 Feb., Hawkins J. said there was no duty to prevent a stranger accidentally taking poison; *Smith* (1826) 2 C. & P. 499; *Shepherd* (1862) 31 L. J. M. C. 102.

¹²⁰ *Studies in Polish and Comparative Law*, 18.

¹²¹ *Gibbins & Proctor* (1918) 13 C. A. R. 134: murder through negligence.

¹²² *Markuss* (1864) 4 F. & F. 356.

¹²³ As in *Coggs v. Bernard* (1703) 2 Lord Raym. 909.

In some cases it is very difficult to see any difference between Mistake of Fact, that is an honest belief based on reasonable grounds, and Lack of Negligence. Why was Mrs. Tolson¹²⁴ innocent? Was it because she had an honest belief based on reasonable grounds, or because she took every possible care to establish the reasonable grounds? And what are reasonable grounds? What a reasonable man would have believed under the same circumstances. Inevitable ignorance of fact equals unconsciousness; but, 'If he could have known had he employed due attention or advertence . . . he is in fact liable on the ground of negligence.'¹²⁵ I believe the line between Crime and Quasi-crime is negligence or carelessness.

'For purposes of the Criminal Law there are degrees of Negligence,' said Lord Atkin.^{125a} Unfortunately, there are; and they are a perfect godsend to defending counsel in confusing juries. The expression 'Criminal Negligence' ought to be forbidden by law. I have often thought that if several juries could be placed about the Old Bailey in an average motor-manslaughter¹²⁶ trial, there would probably be an equal number of verdicts each way. The trouble is that all the jurymen have to be lifted up to the high standard of 'gross negligence,' in the end they are apt to compromise on ordinary negligence, and convict of Dangerous Driving. Again, as the late Sir Maurice Amos often said, motorists comprise the largest criminal class in England,¹²⁷ and they try their own offences; for judges, jurymen, and Justices of the Peace, are all of the motoring class. The jurymen could well be thinking, 'It might have been I.'¹²⁸

There are three ways of looking at Negligence.¹²⁹ (i) As a state of mind. This is the view-point of the analytical jurists; they are contrasting Negligence with Intention or Malice;¹³⁰ and they regard negligence as a form of *mens rea*. Modern writers reject this view-point; they treat Negligence as the opposite of Diligence; and diligence is not a state of mind.¹³¹ (ii) As the breach of a duty to take care, arising at Common Law or by Statute. Lord Macmillan said,¹³² 'The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care.' Looked at in this way, degrees of negligence are quite irrelevant. Was there a duty, and was there a negligent breach of it? Not, what type of breach of it? It is in this sense that Baron Rolfe's famous remark applies; gross negligence is only negligence with a 'vituperative epithet.'¹³³ The test in the Law of Tort is the care a reasonable man would have taken under the same circumstances; and that is all the test that is needed.¹³⁴ (iii) Negligence as careless conduct.

¹²⁴ Tolson (1889) 23 Q. B. D. 168.

^{125a} See note 33, *ante*, p. 213.

¹²⁷ Motoring offences were 59·2 of all offences in 1936, nearly half a million convictions.

¹²⁸ See Turner, 5 C. L. J. 61.

¹³⁰ Austin, Lec. 20, 438 *et seq.*

¹³¹ Pollock, Torts, 350; Morse, Psychology of Negligence, 41 Can. L. J. 233.

¹³² *Donoghue v. Stevenson* [1932] A. C. at p. 618.

¹³³ *Wilson v. Brett* (1843) 11 M. & W. 113.

¹²⁵ Clark, 32.

¹²⁶ To coin a word.

¹²⁹ Charlesworth, Negligence, 5.

¹³⁴ Pound, Law and Morals, 76.

Here we are examining the means by which the breach of duty took place, a standard of conduct; and there are infinite degrees and shades of negligence, as there are of conduct.¹³⁵ It ranges from casual thoughtlessness to vicious indifference; and this is the very thing criminal law is designed to punish justly. I suggest that for determining liability in Criminal Law the test should be as in the Law of Tort, the Reasonable Man Standard. The Canadian Criminal Code seems to have reached this very desirable standard; regarding the duty of persons undertaking acts dangerous to life, sect. 246 enacts, 'to use reasonable knowledge, skill and care in doing any such act;' and of people in charge of dangerous things, by sect. 247, they owe a duty, 'to take reasonable precautions against, and use reasonable care to avoid, such danger.'¹³⁶

After having determined liability on the reasonable man standard, I see no objection to taking into consideration degrees of negligence, in the sense of negligent conduct, when awarding punishment. In the Law of Tort, in an action on the case for Negligence, there is some difficulty in thinking in terms of exemplary damages for gross negligence, but it appears that they can be awarded.¹³⁷ How much more should the Criminal Law, if its purpose is punishment, consider degrees of negligent conduct. It is usual to accept the degrees generally spoken of in connection with the law of bailments, 'gross,' 'ordinary,' and 'slight.' I should prefer, if degrees are to be retained, to add a fourth, 'reckless'; and the difference between 'reckless conduct' and 'gross negligence' could be the difference between Murder and Manslaughter. In *Hull's Case*¹³⁸ it was said that to throw a beam from a roof into the street, after crying a warning, and thus to kill someone, would be manslaughter. Coke,¹³⁹ and Archbold,¹⁴⁰ take it that if it were cast without crying out, and many were passing, and someone were killed, it would be murder. A modern equivalent would be taking a motor-car through a busy street at seventy miles per hour, and killing someone. The difference might have been nicely shown in a case¹⁴¹ where a cask had been dropped from a sling while being raised, and had killed two women in the street. There were three ways in use of slinging casks; two were safe; the third, the one used, was a single loop of rope around the cask. This was 'gross negligence,' and manslaughter; now, had he been lowering casks instead of raising them, and had he simply dropped the cask into the street without slinging it; it would have been 'reckless conduct,' and murder.

There cannot be a definite test, with which to instruct a jury, of what comprises these degrees of negligent conduct; and if one were invented,

¹³⁵ Rash, heedless, careless, foolhardy, thoughtless, reckless, etc.

¹³⁶ And the Soviet Criminal Code, Article 10, does not suggest degrees of negligence.

¹³⁷ *Embley v. Myers* (1880) 6 H. & N. 54.

¹³⁸ (1664) Kelyng, 40.

¹³⁹ 3 Inst. 57.

¹⁴⁰ At p. 902. Also 1 East, P. C. 231; Hale, 431; 1 Hawk. c. 29 s. 9: and s. 31, ss. 5—6. The test was whether the probable danger to life was great and apparent. See Brett J. in *Handley* (1874) 13 Cox, 79.

¹⁴¹ *Rigmaidon* (1833) 1 Lewin, 180.

it would be infringing the duty of jurymen to make the decision.¹⁴² In everything except the difference between murder and manslaughter the whole matter could be made very simple; let the jury decide guilt on the reasonable man standard; and let the Court decide the punishment in relation to the degree of negligent conduct. The difficulty would be that we would lose the line between negligent murder and manslaughter, and all negligent homicide would be manslaughter. Perhaps there is no deed for a negligent variety of murder; there has not been a plethora of cases on it in English legal history.

D. THE DOCTRINE OF CONSTRUCTIVE CRIME.—This is generally considered a harsh doctrine.¹⁴³ I do not feel strongly about it. To bring it into operation there must always be an intent to commit an illegal act; and the only serious hardship arises from the extensive creation of statutory felonies. The anomalies introduced in 1920 by Beard's Case can operate favourably for the accused. There are three varieties of constructive crime to consider. (I) Murder.¹⁴⁴ The existence of Malice Aforethought sets murder apart from manslaughter.¹⁴⁵ Kenny¹⁴⁶ has made an excellent analysis of Malice Aforethought, classified into seven types, convenient for discussion, and on all of which cases can be found scattered through the illustrations in Archbold's Criminal Practice. The first three are called Express Malice: (i) Intent to kill the person killed: (ii) Intent to kill one, and killing another:¹⁴⁷ (iii) Intent to kill, but no particular person.¹⁴⁸ The other four types of Malice Aforethought are Constructive. (iv) Intent to hurt, but not to kill, but to hurt by means of an act intrinsically likely to kill. I have no hesitation in wishing to retain this type; some of the most brutal murders I have ever seen tried, or have read about, come under it.¹⁴⁹ (v) No intent to hurt anyone, but doing an act intrinsically likely to kill.¹⁵⁰ I have already discussed this under Negligence amounting to murder. (vi) Whilst committing any felony with violence, killing anyone. This is the type of Malice Aforethought which most invites criticism. I have not space for a full discussion of it; and it is better that the student should study it for himself;¹⁵¹ but there are a few points to mention. Note that the words

¹⁴² Story, Bailments, § 23, and Lush J. in *Finney* (1874) 12 Cox, 625, suggest tests for particular cases. Hewart C.J. in *Bateman* (1925) 19 C. A. R. 8, and Lord Atkin in *Andrews* [1937] A. C. 576, talk much of degrees of negligence, but suggest no test. Apart from motor-manslaughter, there is not much difficulty with juries. They agree easily enough for instance, on gross negligence in using firearms, or in practical jokes, or games. Jurymen have very definite ideas on standards of conduct, and sound ones.

¹⁴³ Stroud, 173; Turner, 6 C. L. J. 52.

¹⁴⁴ 3 Coke Inst. 47.

¹⁴⁵ 1 Hale, 451; Taylor (1834) 2 Lewin, 215.

¹⁴⁶ Outlines, 136 *et seq.*

¹⁴⁷ *Saunders & Archer* (1576) Plowd, 473; *Hopwood* (1912) 8 C. A. R. 143; attempted suicide. Cf. *Gross* (1913) 23 Cox, 455.

¹⁴⁸ Kel. 27; 4 Bl. Comm. 200; *Fretwell* (1864) 9 Cox, 471.

¹⁴⁹ *Tapner & others* (1749) Newgate Calendar; *Brownrigg* (1767) New Cal.; *Halloway* (1628) Croke Car. 131; *Grey* (1666) Kelyng, 64. Cf. *Greenwood* (1857) 7 Cox, 404. Was the summing up of Wightman J. in this case intended as a general principle or only to apply to the facts of the case?

¹⁵⁰ *Hull* (1664) Kelyng, 40.

¹⁵¹ 3 Co. Inst. 52; 1 Hale, 428; Foster, Crown Law, 259; 1 Odgers, Common Law, 281; Turner, 6 C. L. J. 55; *Lad* (1773) 1 Leach, 96; no proper averment; *Horsey* (1862) 3 F. & F. 287; read the footnote; Cockburn C.J. in *Desmond & others* (1868) *Times*, 28 April; *Serné & Goldfinch* (1887) 16 Cox, 311; *Beard* [1920] A. C. 479.

'intrinsically likely to kill' which are present in the fourth and fifth forms are absent from this sixth form; and this gives a huge advantage to the prosecution. The Common Law felonies were all serious, although they were not all dangerous to life; but statutes have added very many felonies which, although, originally capital, were not dangerous to life; at one period there were some 220 capital felonies. There are now about 200 felonies, of which several are capital; but the great bulk of them are not dangerous to life. This form of Malice Aforethought must have been much older than Coke's time; but, even in his time, it must have been fairly limited in scope, because it was later that there came the great outburst of creating statutory felonies. I submit that Stephen J. got somewhere near the truth in *Serné and Goldfinch's Case*,¹⁵¹ when he suggested that this form should be confined to felonies which were dangerous to life. Hale and Odgers have each made the same mistake in discussing this type; they include Battery, which is usually a misdemeanour, at least in its modern sense. I submit that, at the time this form of malice aforethought was first recognized, probably all the felonies that applied to it either (a) involved violence to the person, *e.g.*, intent to maim; or, (b) were of a kind the natural and probable consequence of which would be to cause death; *e.g.*, setting fire to a dwelling-house. It would be well to confine this type of malice aforethought to such felonies. The House of Lords has not taken this view in *Beard's Case*; it took the view that the felony being committed need not be one intrinsically likely to kill. A second point is that in *Beard's Case* the word 'felony' was qualified by the word 'violent.' I can find no authority for the word 'violent' in any record. I suggest that Lord Birkenhead took his law from Hale, whose illustrations all involve violence, but were not all intrinsically dangerous to life, or even always felonies, for they included ordinary battery. What is a 'violent felony'? Would it include spilling a pool of petrol on a floor, and setting fire to it with a match? About the only way in which such an act could be included is to construe violence as the '*vi et armis*' of the Writ of Trespass, direct unlawful contact. We shall require another House of Lords case to determine the meaning of 'violent felony.' Any way, this sixth type of malice aforethought is in very common use, and is accumulating further refinements.¹⁵² (vii) Whilst resisting lawful arrest, killing someone.¹⁵³ I can find no English case on this. The only case in which it could make any difference to the accused would be when he had struck the officer a blow which was not intrinsically likely to kill; which would otherwise have resulted in a conviction for manslaughter.

I have been told that the line between Express Malice and Constructive Malice is the same as the line between Murder in the First Degree and Murder in the Second Degree (of which only the First Degree type is capital) in some of the States of the United States of America.

¹⁵¹ See previous page.

¹⁵² *Bells & Ridley* (1930) 22 C. A. R. 148; *Chilcott* (1940) Newcastle Assizes, 2 Feb.; *Larkin* (1943) 29 C. A. R. 18; *Jarmain* [1946] 1 K. B. 74.

¹⁵³ 1 Hale, 457, 460; Foster, 270, 308; Archbold, 911. Discussed in *Woolmer & another* (1832) 1 Mood. 334; *McMullen* [1925] 2 I. R. 9: convicted.

On the whole, excepting the above suggestions about the sixth form of malice aforethought, perhaps the English law of murder is better left as it is. There is very little murder in England as compared with some other countries; for instance, with that in any proportional area and population of the United States.¹⁵⁴ With great respect, I cannot agree with some of the points raised by a learned writer in a recent article.¹⁵⁵ These forms of malice aforethought are hardly 'obscurities and absurdities.' No form of malice aforethought is absurd; they had to be various to cover all the types of extreme indifference to the lives of others. There is no obscurity: one may not always agree with the clarification, but they have been clarified.

(II) Manslaughter, whilst committing some unlawful act which is not a felony, and killing someone. Some cases on this require discussion. The general principle of liability was expressed nicely by Tindal C.J.,¹⁵⁶ 'The act was wrongful, it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act: if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death.'

There are many cases on this in which there is a cross-over with a type of Voluntary Manslaughter, 'Intent to hurt, but not to kill, but to hurt by means of an act not intrinsically likely to kill'; cases of death caused whilst committing a battery are very common.¹⁵⁷ In fact, it is difficult to think of a case which would not fall under Voluntary Manslaughter or Negligence. The arguable case happens where the accused was committing a tort and killed someone;¹⁵⁸ as in *Fenton's Case*. In that case, by the tort, the accused appear to have left an undiscoverable trap; they appear to have thrown stones into the shaft of a coal pit when no one was about, smashed the casing, and a descending corf later struck the smashed casing, upset, and its occupant fell to the bottom of the shaft and was killed. The jury took it that the causation was direct, and convicted. A recent case¹⁵⁹ is an example of the change of opinion about this type of manslaughter. Here the causation was physically direct. A poacher, without any negligence, fired a shot at a rabbit, and killed a boy hidden behind some bushes, not knowing the boy was there. He was indicted for manslaughter whilst committing the unlawful act of poaching. The Judge stopped the case.

In another interesting case¹⁶⁰ accused had taken a heavy box from a stall on Brighton pier, thrown it into the sea, and killed a bather. The

¹⁵⁴ I collected for one period of ten years, all the Homicides, England, 2,174; equivalent area of the U.S. of A., 19,775.

¹⁵⁵ Turner, 6 C. L. J. 52.

¹⁵⁶ In *Fenton* (1830) 1 Lewin, 179.

¹⁵⁷ *Wild* (1837) 2 Lewin, 214; *Dristoll* (1841) C. & Mar. 214; *Morne* (1910) 4 C. A. R. 50; *Murphy* (1944) Lancaster Assizes, 19 Jan.: Hit police constable, not heavy blow, head hit pavement, killed. A practical joke case is *Sullivan* (1836) 7 C. & P. 641.

¹⁵⁸ Discussed in *Martin* (1827) 3 C. & P. 211.

¹⁵⁹ *Holmes* (1941) Leeds Assizes, 19 May; *Daily Express*.

¹⁶⁰ *Franklin* (1883) 15 Cox, 163.

argument for the prosecution appears to have been that whilst committing a trespass to goods he killed someone; but Field J., after consulting Mathew J., ruled that the case must go to the jury on Negligence. Now, this was clever. The trespass was committed when accused touched the box, and it was not that which killed the bather; moreover, taking it and throwing it into the sea could be the felony of larceny, so one might as well talk of the sixth form of malice aforethought, and murder. One of the reasons why the Common Law of England has been so successful is because the Common Law Judges and lawyers usually stopped short of letting their logic result in an absurdity: so this case was much better taken on negligence.¹⁶¹

One type of case that definitely does not come into this class is motor-homicide. The House of Lords has held in *Andrews*¹⁶² that killing someone whilst accused was committing the unlawful act of Dangerous Driving is not sufficient for manslaughter in motoring cases; there must also be gross negligence. This is not a particularly happy judgment. I should have much preferred the summing-up of du Parcq J. at the trial to be the correct statement of the law.¹⁶³ Unless offences committed on the roads differ from other types of offences, there seems no point in dragging in gross negligence, with its inevitable confusion of the jury;¹⁶⁴ but it does appear as though there may be an analogy for it from the law of tort, where in a running-down case plaintiff must prove negligence.¹⁶⁵

(III) If there is a third type of constructive crime, it is suggested that it might be stated as follows.¹⁶⁶ (i) If a person sets out to commit an unlawful act, such as a tort, and the act turns out to be a crime, the intention to commit the unlawful act is sufficient *mens rea* to convict of the crime. Unlawful act means a legal wrong, not a purely moral wrong.¹⁶⁷ (ii) But the Fact charged, as a crime must be the same as the act intended, or foreseen as a result of it.¹⁶⁸ (iii) If the crime committed was the same as the wrong intended, it does not matter against whom or what it was committed.¹⁶⁹

¹⁶¹ Had *Bruce* (1847) 2 Cox, 262, been taken on negligence, the result might have been different.

¹⁶² (1937) 26 C. A. R. 34.

¹⁶³ See 26 C. A. R. at p. 36. See also *Turner*, 5 C. L. J. 71. to the same effect.

¹⁶⁴ E.g., *Cohen* (1937) *Times*: bought old car; bad brakes; drove through city several miles; then ran into crowd at tramway stop; killed two, injured five; not guilty manslaughter, guilty dangerous driving; thirteen months' imprisonment, and lose licence for ten years. This case is typical.

¹⁶⁵ *Winfield*, Tort, 222; *Winfield and Goodhart*, 49 L. Q. R. 359; *Gayler and Pope v. Davies* [1924] 2 K. B. 82. An interesting solution would be to turn Dangerous Driving under sect. 11 into a felony, and try to bring the cases under the (vi) type of Malice Aforethought, and Murder.

¹⁶⁶ For: *Kenny*, Outlines, 14th ed., 41 *et seq.*; *Stroud*, 16, 34 *et seq.*; *Archbold*, 21; 9 Hals. 16. Against: *Stallybrass*, 52 L. Q. R. 64; *Jackson*, 6 C. L. J. 86.

¹⁶⁷ *Forbes and Webb* (1865) 10 Cox, 362; *Prince* (1875) 2 C. C. R. 154. I shall discuss this case under Mistake of Fact.

¹⁶⁸ *Pembliton* (1874) 2 C. C. R. 119.

¹⁶⁹ *Latimer* (1886) 17 Q. B. D. 359.

E. EXCEPTIONS FROM CRIMINAL RESPONSIBILITY.—Kenny's classification of these is helpful for discussion purposes;¹⁷⁰ but it seems unnecessary to pass it on their effect on the will. Some of them require a little elaboration, some do not. They are as follows: Infancy,¹⁷¹ Insanity¹⁷², Drunkenness,¹⁷³ Corporations.¹⁷⁴ In the leading case,¹⁷⁵ Lord Hewart C.J. put the position of the corporation very neatly, 'the act of the driver was the act of the respondents . . . it is quite clear that the limited company as a company could not drive the car.' The driver had been summoned before for a similar offence, and intended to commit the crime on this occasion now being tried. At Common Law, as corporations are physically fictitious, there was difficulty about the *mens rea*; it is now recognized that the *mens rea* of any official or servant may be the *mens rea* of the corporation; a necessary recognition if it is to be convicted.

I should like to interpolate here a word about Master and Servant. The general rule is that a master is not liable for a crime committed by the servant;¹⁷⁶ 'it is a principle of our criminal law that the condition of mind of the servant must not be imputed to the master.'¹⁷⁷ This rule serves well enough in most cases, but there are occasions when a master delegates to his servant, or a principal to his agent, the duty to think for him; and he has to take responsibility for that thinking if in the result the servant or agent commits a crime. This occurs where the owner of a business completely delegates its management to another, and rarely or never goes near it. 'A man may put another in his position so as to represent him for the purpose of knowledge.'¹⁷⁸ 'Constructive knowledge will supply the place of actual knowledge.'¹⁷⁹ His liability is based on pretty much the same rules as the tortious liability of a master for a servant; he may even have forbidden the act, if it is done in the course of employment the master is liable. In the leading case,¹⁸⁰ Lord Hewart C.J. said: 'He had transferred to the manager the exercise of discretion in the conduct of the business, and it seems to me that the only reasonable conclusion is, regard being had to the purposes of this Act, that the knowledge of the manager was the knowledge of the keeper of the house.'

Mistake of Fact. Writers have stated this defence in many different ways, but they can all be summed up in this proposition: Mistake is a defence provided (i) it is a mistake of fact, and not of law;¹⁸¹ (ii) that

¹⁷⁰ Kenny, *Outlines*, Cap. IV.

¹⁷¹ Kenny, c. IV.

¹⁷² 8 C. L. J. 300; *Journal of Comparative Legislation* (1934), 36; 13 *Medico-Legal Review*, 93.

¹⁷³ Kenny, c. IV; *Beard* [1920] A. C. 479.

¹⁷⁴ Kenny, c. IV.

¹⁷⁵ *Griffiths v. Studebaker, Ltd.* [1924] 1 K. B. 102; 27 Cox, 565: a very important case.

¹⁷⁶ *Huggins* (1730) 2 Ld. Raym. 1574.

¹⁷⁷ *Cave J.* in *Chisholm v. Doulton* (1889) 22 Q. B. D. 736.

¹⁷⁸ Lord Coleridge C.J. in *Somerset v. Hart* (1884) 12 Q. B. D. 360.

¹⁷⁹ Cockburn C.J. in *Bosley v. Davies* (1875) 1 Q. B. at p. 887.

¹⁸⁰ *Allen v. Whitehead* [1930] 1 K. B. 211.

¹⁸¹ *Bailey* (1800) R. & R. 1. *Cf. Hall* (1828) 3 C. & P. 409.

if the facts had actually existed as the accused thought they did, there would have been no legal wrong, *i.e.*, crime or tort;¹⁸² and (iii) the mistake must be reasonable; this is a question of fact for the jury or justices.¹⁸³

A very great deal has been written about the case of *Rex v. Prince* (1875) 2 C. C. R. 154, in relation to (ii); and about the case of *Rex v. Tolson* (1889) 23 Q. B. D. 168, and other cases on bigamy, in relation to (iii). All this literature is really aimed at proving that Abduction and Bigamy are either (a) Crimes, or (b) Quasi-Crimes. From the point of view of the accused the question is of very pertinent interest, for both are serious, and can be highly punished. From our point of view the question is merely one of academic interest; there are Quasi-Crimes, and it makes little difference whether or not Abduction and Bigamy are amongst their number; except that their seriousness provides a strong argument for getting rid of Quasi-Crime. But it is of interest to understand the views of Kenny and Stroud; and to know what actually did happen in these cases.

Prince was indicted under the Offences against the Person Act, 1861, s. 55, 'Whoever shall unlawfully take . . . any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father, mother, . . .' It is quite clear from the evidence¹⁸⁴ that Prince (i) had been meeting the girl clandestinely, (ii) knew she was living with her parents, (iii) intended to take her, and did take her, away from the care of her parents, and (iv) on reasonable grounds, believed her to be eighteen years of age. Now the whole argument of Kenny or Stroud hinges on the notion that Prince intended to commit a Tort;¹⁸⁵ therefore his defence of Mistake fails on (ii), because had the facts existed as he thought they did there would have been a legal wrong; and from this the deduction as to *mens rea* might be stated 'if one sets out to commit a legal wrong, and the wrong turns out to be a crime, the intention to commit the legal wrong is sufficient *mens rea* to convict of the crime.' But Kenny goes farther for he says 'intended to commit and did commit an immoral act.'

Now let us have a look at it all. I have not space to summarize the four judgments; but I want to comment on them. Blackburn J. (and the seven judges who concurred with him) may or may not have believed that Prince intended to commit a tort, he does not mention it. Kenny and Stroud both rely on the proposition that all the judges, except Brett J. concurred in believing that Prince intended to commit the tort of taking a girl of eighteen years from the custody of her parents. I very much doubt if this is correct, because at none of the sittings of the Court had any of these eight judges said anything about tort. It was Bramwell B. who

¹⁸² Moral wrong is too undefined to be included.

¹⁸³ Reasonable: *Levett* (1638) Cro. Car. 538. Unreasonable: *Senior* (1899) 1 Q. B. 283; *Jones* (1874) 12 Cox, 628.

¹⁸⁴ *Times* newspaper: 25 March, 1875, p. 12; 26 April, p. 13; 31 May, p. 13; 28 June, p. 6.

¹⁸⁵ Kenny, 43; Stroud, 37.

expressed himself very strongly on morals at the sitting on 31st May: Brett: 'Is it unlawful to persuade a woman above the age of sixteen to leave her father's house?' Mr. Lilley: 'It is unlawful at Common Law.' Brett: 'Why?' Lilley: 'It is *contra bonos mores*.' Brett: 'Then is everything that is *contra bonos mores* indictable?' The Chief Justice: 'There may be things contrary to morality which are not contrary to law.' Bramwell: 'But it is contrary to law; it is intrinsically wrong because it is contrary to morality to induce a woman of any age to leave her father's house.' Brett: 'At what age is that doctrine to cease to apply?' Bramwell: 'It applies at any age if she is living with her father.' Yet Bramwell B. when about to deliver his judgment, definitely stated that he agreed with Blackburn's judgment; as did also Denman J. when delivering his; and I might remind readers that he knew all about the facts because he had tried the case in the first instance. Kenny completely ignores the judgment of Blackburn J. and concentrates on that of Bramwell B.¹⁸⁶ Brett J. said in his judgment, emphatically, that taking away a girl aged eighteen was not a tort, and that no action would lie for it. I might say that I have not found it stated in any text-book on Tort that Abduction is a tort, excepting the ancient action for abducting an heir.¹⁸⁷ In Kenny's books it is pleasant to see the intense respect for morality which he always upholds so ably: but, in *Prince's Case*, he is, I fear, over subtle. The majority of the judges, for there were only five with Bramwell B., did not hold that Prince intended to commit a tort. Stephen J. was right when he stated that sect. 55 was absolute (that is, it created a Quasi-Crime).¹⁸⁸ The anomaly is that it makes the word 'unlawful' in sect. 55 quite meaningless.

The only real question in *Tolson's Case*¹⁸⁹ seems to be that raised by Manisty J., does sect. 57 of the Offences against the Person Act, 1861, create a Quasi-Crime of Bigamy?¹⁹⁰ In this section, and in its ancestor 1 Jac. I, c. 11, there is not the slightest mention of any mental element. There is the Statutory defence set out, 'shall have been continually absent from such person for the space of seven years then last past and shall not have been known by such person'^{190a} to be living within that time.' At 1 Hawkins, 322, it is stated about the old Statute, 'the statute being penal, shall be construed favourably.' The Court for Crown Cases Reserved, by a majority, imported *mens rea* into sect. 57. This raises the question of Mistake of Fact (iii). The mistake must be reasonable; and it was held that an honest belief, from reasonable grounds was a good defence.

In the case of *Wheat and Stocks*¹⁹¹ the Court of Criminal Appeal found that on the facts of the case the belief of the accused in a valid divorce was

¹⁸⁶ Kenny very kindly gave me many of his books, and often his marginal notes are enlightening. He noted beside Brett's judgment, 'There is an actionable tort of abduction.'

¹⁸⁷ See Winfield, Tort, 250; Salmond, Torts, 380.

¹⁸⁸ 2 St. Hist. 117.

¹⁸⁹ (1889) 16 Cox, 629.

¹⁹⁰ 16 Cox, 652.

^{190a} I suggest adding the words 'after due enquiry made.'

¹⁹¹ (1921) 15 C. A. R. 134.

not reasonable, and that the appeal must be dismissed on that ground alone. The Court then went on to say that had the belief in a divorce been honest and based on reasonable grounds, it still would not have been a defence to bigamy under sect. 57.¹⁹² The Court also suggested that the direction to the jury¹⁹³ in *Thompson* (1905) 70 J. P. 6, to the effect that an honest and reasonable belief that the first marriage was invalid was a good defence, could not be supported.

It is interesting that two United States cases on bigamy, on statutes worded very similarly to sect. 57, went exactly the opposite way to the judgments in *Tolson* and in *Wheat and Stocks*. The conviction on an honest and reasonable belief in death was upheld on the ground that the only defence under the statute was the seven years' absence one, and that, by putting this in the statute, the Legislature intended to exclude all other defences.¹⁹⁴ On a similar belief in divorce, the conviction was quashed.¹⁹⁵ It all goes to show how much on the borderline is this whole business of interpretation of statutes; it seems to give full scope to the idiosyncrasies of Courts.¹⁹⁶

To continue with the exemptions from criminal responsibility, some of the remaining ones are rather indefinite; but all are fairly simple; Subordination of Crown servants;¹⁹⁷ Compulsion;¹⁹⁸ Coercion;¹⁹⁹ Necessity. It is very doubtful whether necessity is a defence; I cannot find a single case of it, and practitioners' books, like Archbold, do not even mention it.²⁰⁰ There seems no objection to there being such a defence if a suitable case should arise. I should not like to say that the case of *Bourne* [1939] 1 K. B. 687, is an authority for this defence. Accused, an obstetrical surgeon, had procured the abortion of a child, aged fourteen, who had been raped; he had the honest belief that the child could not survive a confinement; he had consulted other obstetricians, who had agreed with him; and when the pregnancy was two months advanced he procured an abortion. He then had himself charged under the Offences against the Person Act, 1861, s. 58, with 'shall unlawfully use,' etc. He was acquitted. Perhaps the most interesting point in the case, in view of the decision in *Prince's Case*, is that Macnaghten J. said that the word 'unlawfully' in sect. 58 must be

¹⁹² This has not been approved in two of the Dominions: *Thomas v. The King*, 59 Comm. L. R. 279; and *Carswell* (1926) N. Z. L. R. 321; and see G. W. Paton, Bigamy and *Mens Rea*, 2 J. of C. L. 601.

¹⁹³ But the same direction to the jury as in *Thompson* was given by Horridge J. at Manchester Assizes, 19 Feb., 1913: The principle was also approved by the Canadian Court of Appeal, 9 Can. Cro. Cas. 153.

¹⁹⁴ *Comm. v. Mash* (1844) 7 Met. 472.

¹⁹⁵ *Squire v. The State* (1874) 46 Indiana, 459.

¹⁹⁶ It is not very helpful to explain belief in death as Mistake of Fact, and belief in a divorce as a Mistake of Law. See also on Bigamy: *Kircaldy* (1928) 167 L. T. Jo. 44-46; *Connatty* (1919) 83 J. P. 292; *Thompson* (1905) 70 J. P. 6.

¹⁹⁷ Kenny, c. IV.

¹⁹⁸ 2 St. Hist. 105; *Tyler and Price* (1838) 8 C. & P. 616; *McGrowther* (1746) Foster, 13; *Crutchley* (1831) 5 C. & P. 131.

¹⁹⁹ Archbold, 20.

²⁰⁰ See 2 St. Hist. 108; St. Dig. Art. 43; Stroud, 258; Kenny, c. IV; *Stratton* (1780) 21 S. T. 1045. There is not an analogy from cases in Tort.

given some meaning, and that it implied that there must be some procurements of abortions that are lawful. It might have been an example of Necessity if at Common Law a doctor could take the life of a child in order to save that of the mother; but this right was doubtful, and has now been made statutory in the Infant Life Preservation Act, 1929, s. 1 (1). All that this case would seem to show is that the science of diagnosis has advanced to the stage that the doctor can foresee the danger to the mother several months before confinement, and may take steps to preserve her life accordingly.

F. EVIDENCE.—There are a great many crimes in which it is necessary to prove Intention,^{200a} and it is rare that there is any direct evidence of the state of a man's mind at the relevant time of committing the Fact. The intention can often be deduced from conduct, and all the known facts of conduct leading up to and following the Fact can be taken into account by the jury or Court in making the deduction.²⁰¹

Aiding the prosecution, there is a rebuttable Presumption that a man is taken to intend the natural and probable consequences of his acts.²⁰² Of late, there seems to be a general tendency to lighten the burden of proof for the defence. In *Woolmington's Case*²⁰³ the House of Lords held that if the Fact is admitted, or has been proved, a reasonable explanation is required from the defence, not proof of innocence; it is for the prosecution to prove that the explanation is false, and it must prove this 'beyond all reasonable doubt.' I have several times heard Lord Hewart instruct a jury in words that had become a formula with him, 'It is not that you *may* acquit; if there is any real doubt you *must* acquit; it is a right of the accused to be acquitted.' In a later case²⁰⁴ Lord Hewart declared that when the defence has the burden of proof it need only raise a reasonable doubt in the minds of the jury as to either (i) whether the necessary facts had been proved; or (ii) the inference to be drawn from the facts proved. In a still more recent case²⁰⁵ the Court of Criminal Appeal has held that where a presumption is raised against the accused, he may rebut it by satisfying the jury of the probability of that which he is called upon to establish.

As a general rule, the accused cannot be called upon to prove a negative;²⁰⁶ but there are one or two Common Law exceptions to this rule, and the statutory exceptions are becoming legion.²⁰⁷

'EVERY PERSON KNOWS THE LAW' is an irrebuttable presumption, which is usually taken as the base of the rule that Mistake of Law is no defence. Blackburn J. has approved the statement of Maule J., 'There

^{200a} See note 26, *ante*, p. 213.

²⁰¹ *Turner* (1849) 3 Cox, 304; *Mulcahy* (1868) 3 H. L. at p. 317; *Wilson* (1856) D. & B. 157.

²⁰² *Street*, Foundations, 5. *Beard* [1920] A. C. 479; *Scott v. Shepherd* (1773) 2 W. Bl. 892.

²⁰³ [1935] A. C. 462.

²⁰⁴ *Jackson* (1936) 80 S. J. 977.

²⁰⁵ *Carr-Briant* (1943) 29 C. A. R. 76.

²⁰⁶ *Willshire* (1881) 6 Q. B. D. 366.

²⁰⁷ *E.g.*, Larceny Act, 1916, s. 28 (2).

is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so.^{207a} However, this statement can only be taken as a protest. The rule is general in criminal and in civil²⁰⁸ cases.

The origin of the rule is far from clear; it probably originated in public policy, in the fear of having difficulty in getting direct proof of knowledge. No one can know the law; but what it amounts to in effect is that everyone is treated by the Courts as though he did know the law. With every possible precaution taken, even when accused had taken counsel's opinion, he has not been excused.²⁰⁹ Apologists for this severity argue that crimes are extraordinary acts which a man should expect to be illegal.²¹⁰ This is true of dishonourable conduct, generally disapproved;²¹¹ but it is not true of the pest of creating crimes in connection with administration and politics. There is no intuition to tell us which of these acts are criminal. If such legislation were even consistently advanced in harmony with the economic and social ideology of the whole community, we should find it easier to anticipate it; but it comes in haphazard titbits.²¹² Other apologists suggest the proper use of nominal punishments²¹³ for inadvertent offenders as an amelioration. But surely there would not be a Mistake of Law if the offenders were anything else but inadvertent, so, if they are only to be nominally punished, why trouble to try them.²¹⁴ The Courts do not always punish nominally; a man was recently^{214a} awarded twelve months' imprisonment, fined £1,000, and ordered to pay half the costs of the prosecution; the Court of Criminal Appeal remarking, 'the Courts are bound to treat breaches of these orders as serious offences, and the only form of punishment likely to deter such persons as these appellants is a substantial sentence of imprisonment.' It is difficult to follow such logic; for there is not even a deterrent effect on future occasions; how could there be when the accused had been guilty of no fault.

This type of Quasi-crime could be eliminated, and no harm done, by changing the presumption 'all men know the law' into a rebuttable presumption. Apparently such changes have been frequently made in the past.²¹⁵

CLASSES OF CRIMES AND GRADES OF PROOF REQUIRED.—Whatever type of *mens rea* one has to prove, the amount of proof of it that will

^{207a} *Mayor, etc. of Tewkesbury* (1868) 3 Q. B. 629.

²⁰⁸ *Winfield*, 59 L. Q. R. 328.

²⁰⁹ *Cooper v. Simmons* (1862) 31 L. J. 138; *State v. Stiggles* (1927) 202 Ohio, 1318.

²¹⁰ *Clark*, 11; *Stroud*, 59; *Ewing*, *The Morality of Punishment*, 202.

²¹¹ This is seen by the furtive way in which acts such as trade restriction arrangements, or sales to a black-marketer, of which the public would disapprove, are carried out.

²¹² See *H. Mannheim on Trade Laws*, 7 *Mod. Law Review*, 12.

²¹³ *Jackson*, 6 C. L. J. 90.

²¹⁴ True, Divisional Courts frequently send cases back to the Justices with an intimation about easy punishments; but I believe it is more an expression of contempt for the legislation than an instruction.

^{214a} *Sorsky & others* (1944) 30 C. A. R. 84.

²¹⁵ *Best*, *Evidence*, 274: and as to precautions taken that unusual laws should reach the public ear, 300.

be required will vary with the type of crime to which it is to be applied, that is to say, crimes fall into groups for the purpose of proof. (I) Very serious crimes, requiring very clear proof of the intent, or other necessary ingredient. Murder; Burglary; Receiving Stolen Goods; Felonious Wounding; are examples. (II) Ordinary crimes, ordinary proof required. The great bulk of crimes is in this class; e.g., manslaughter; motoring offences; larceny. The prosecution has done enough when it has proved, (a) that the accused committed the Fact, and (b) that on the face of things, he had no legal right to commit it. The burden of explanation shifts to the defence. (III) Crimes not clearly defined as to proof; e.g., Bigamy; Offences against the Food and Drugs Acts; Licensing Acts; Game Acts; etc. It does not matter whether these crimes are committed by a real person, a corporation, or by servants or agents. Here we have to find the division between Crime and Quasi-crime. There are very many of these vague statutes;²¹⁶ and there are scores of cases illustrating how the Courts have taken infinite pains (a) in construing the statute; and unless it was so worded as positively to exclude *mens rea*, the Court has left the crime in this class; and (b) in searching for the presence or absence of negligence.²¹⁷ 'In many cases of what would at first sight appear to be no more than Quasi-crimes, the act or conduct of the defendant is accompanied by some degree of negligence . . . the existence of which is sufficient to justify the punishment of the conduct as truly criminal.'²¹⁸ '*Mens rea* . . . may consist of a traitorous or malicious or fraudulent intent or guilty knowledge or negligence.'²¹⁹ The prosecution must prove the Fact; the defence must prove that it was done innocently; if the evidence discloses any careless conduct, it is sufficient to support a conviction.

G. QUASI-CRIME.—Lord Goddard recently said, 'With the complexity of modern litigation one knows that there are times when the Court is constrained to find that by reason of the clear terms of an Act of Parliament *mens rea*, or the absence of *mens rea*, becomes immaterial, and that if a certain act is done an offence is committed whether the person charged knew or did not know the fact. It seems to me equally clear that the Court has always been of the opinion that *mens rea* is generally a constituent in a criminal offence.'^{219a} I have no doubt he would approve Lord Atkin's widely-cited remark, made in an earlier case.²²⁰ 'I view with some trepidation any tendency to diminish the importance of the rule as to *mens rea* . . . there are cases no doubt where a statute makes it

²¹⁶ But recent legislation inclines to putting in words like 'knowingly' or 'with due diligence' which indicate the *mens rea*, or by tabulating possible defences.

²¹⁷ No negligence: *Tolson* (1889) 23 Q. B. D. 168; *Bosley v. Davies* (1875) 1 Q. B. 87; *Derbyshire v. Houlston* [1897] 1 Q. B. 772; *Dickinson v. Ead* (1914) 111 L. T. 378; *Sherras v. de Rutzen* [1895] 1 Q. B. 918; *Newell v. Cross* (1936) 52 T. L. R. 489, a very good example, and see 2 J. of C. L. 148. Negligence: *Thompson* (1905) 70 J. P. 6; *Korten v. West Sussex C. C.* (1903) 72 L. J. K. B. 514.

²¹⁸ Stroud, 31.

²¹⁹ 9 Halsbury, 11.

^{219a} *Evans v. Dell* [1937] 1 All E. R. 349; 101 J. P. 149.

²²⁰ *Mahmoud v. Ispahani* [1921] 2 K. B. 716.

plain that an offence is created without a criminal intention on the part of the person who is charged, but these cases . . . are to my mind in themselves anomalous, and I should hesitate to increase their number without being satisfied upon argument that this is one of them.'

Very many other judges have described Quasi-crime, and confined it strictly to those statutes in which no other interpretation is possible.²²¹ Some control is kept over making by-laws; for it has been held that a by-law creating a crime without *mens rea* is *ultra vires* as being both contrary to law and unreasonable.²²²

Probably no Judge has expressed more approval of Quasi-crime than Avory J. Perhaps I may be pardoned, even though he has gone to his judgment, for saying that Avory J. seems to have had a tendency, in interpreting the law, to lean against the accused; perhaps erring in severity.²²³

I have already dealt with one type of Quasi-crime under the heading of 'Every Person Knows the Law.' The second type occurs when a Statute or Order is so worded as to create a crime on the Fact alone, and to exclude definitely the necessity for proving or disproving *mens rea* of any kind. I shall state in brief detail two typical examples.

In *Parker v. Alder*²²⁴ and in *Andrews v. Luckin*²²⁵ the facts were substantially the same; milk, in perfect condition, was sent by rail to London to a dealer. I believe in one case the churn of milk was locked, in the other it was not. In each case, a thief stole some of the milk *en route*, and replaced the quantity with water. There was not the slightest suggestion, in either case, of Blameworthiness in the accused, who had shipped the milk. Lord Russell held that the property in the milk did not pass to the London buyer until the milk reached the London railway station; by that time it had been adulterated; so the accused was convicted under the Food and Drugs Act, 1875, s. 6, of 'selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, or quality demanded by the purchaser.'²²⁶

In *Chajutin v. Whitehead*²²⁷ a Hungarian was in England with a passport which he had every reason to believe was genuine in every way. It had been altered before he received it from the proper authority in Budapest. He was convicted at Bow Street under the Aliens Order,

²²¹ Brett M.R.: *A. G. v. Bradlaugh* (1884) 14 Q. B. D. at p. 689; Stephen J.: *Tolson* (1889) 23 Q. B. D. 189; Field J. and Cave J.: *Chisholm v. Doulton* (1889) 22 Q. B. D. 736; Wright J.: *Sherras v. de Rutzen* [1895] 1 Q. B. 918, Hawkins J.: *Derbyshire v. Houlston* [1897] 1 Q. B. 772; Lord Russell C.J.: *Williamson v. Norris* [1899] 1 Q. B. 7; Channell J.: *Pearks, etc. v. Ward* [1902] 2 K. B. 11; Lord Alverstone C.J.: *Paul v. Hargreaves* [1908] 2 K. B. 289; Lord Reading C.J.: *Mousell Bros. v. L. & N. W. R.* [1917] 2 K. B. 845, and in this same case Atkin J. laid down a rule for interpreting statutes; Lord Cooper: *Duguid v. Fraser* (1940) 5 J. of C. L. 337.

²²² *London Passenger Transport Board v. Sumner* (1935) 52 T. L. R. 13.

²²³ As in *Woolmington* (1935) 25 C. A. R. at p. 76. See also Lord Maugham in *London Passenger Transport Board v. Moscrop* [1942] A. C. at p. 342, on strict interpretation of penal statutes.

²²⁴ [1899] 1 Q. B. 20.

²²⁵ (1917) 87 L. J. K. B. 507.

²²⁶ First offence fine up to £50; second offence, six months' imprisonment.

²²⁷ [1938] 1 K. B. 506.

1920, 18 (4) (d), 'without lawful authority uses or has in his possession any forged, altered, or irregular certificate, passport, or other document.' The Appeal Committee allowed his appeal on the ground that there was no *mens rea*, he had an honest belief on reasonable grounds that the passport was correct. The Divisional Court reversed this, on the ground that the Order excluded *mens rea*.²²⁸

It is difficult to see what possible good end this type of legislation can serve. There is an increasing class of idling people, unwilling to accept discipline, responsibility, or hard work; could Quasi-crime have been used to control these there might have been something to say for it. But these people know what they are doing, and quietly drift their way to become real criminals. Quasi-crime catches the innocent.²²⁹ Many people think that the purpose of the Criminal Law is to make men conform to the law. This is not so; its real purpose is to make men *choose* to conform to the law. A man cannot make a choice unless he knows that he is breaking the law. Even *mens rea* in the sense of 'intent to do the act forbidden' is not required in Quasi-crime; as witness *Chajutin's Case*, *Larsonneur's Case*, and *Parker v. Alder*. 'A narrow adherence to the strict letter of the law when its doctrines run counter to the inherent sense of fairness which inspires common men, tends to bring the law, and its administration, into ridicule and dislike.'²³⁰ This was said in another connection, but it is just as appropriate here. Writers, generally, have deprecated Quasi-crime, and salved their consciences by minimizing its importance.²³¹ Some have given warning of its injustice.²³²

Political Idealism in this country, in the past half century, has paid more attention to ends than to means. Whatever guise our politics took, the urge was the same:—

Ah, Love! could thou and I with Fate conspire
To grasp this sorry Scheme of Things entire,
Would not we shatter it to bits—and then
Re-mould it nearer to the Heart's Desire !

Quasi-crime has been a convenient short-cut to many ends; it has been used as the primitive man used violence. It is, however, very striking that the most pretentious system of political idealism in modern times can pin its faith to Article 10 of the Soviet Penal Code; and carry out

²²⁸ Cases of Quasi-crime: *Woodrow* (1846) 15 M. & W. 404; *Prince* (1875) 2 C. C. R. 154; *Wheat & Stocks* [1921] 2 K. B. 118; *Horton v. Gwynne* [1921] 2 K. B. 661; *Leinster* (1924) 17 C. A. R. 176; *Larsonneur* (1933) 24 C. A. R. 74; *Board of Trade v. Woods* (1944) 8 J. C. L. 85; *Jacobs & others* (1944) 30 C. A. R. 1, conspiracy; *I. C. R. Haulage Co. Ltd.* (1944) 30 C. A. R. 31, but in a common law conspiracy *mens rea* is necessary; *People v Hatinger* (1913) 174 Mich. 333; *Mitchell v. Morrison* (1938) J. C. 64, by majority, three strongly dissenting: Scots law case.

²²⁹ One wonders what M. Chajutin, having paid his £40 fine; his £5 5s. 0d. costs, his lawyers' fees, and having been deported, would find to say of British justice when he got back to Budapest.

²³⁰ Turner, 6 C. L. J. 65.

²³¹ Russell, 45; 9 Halsbury, 11; Stroud, 34; Wigram, 383; Lawson, Leading Cases, 54; Jackson, 6 C. L. J. 83; Stephen, Gour, Wood & Waite.

²³² Stallybrass, 52 L. Q. R. 60. Kenny has gone too far, and practically ignores it, Outlines 39, 45, 46, 49.

its extensive programme without arbitrary use of the Criminal Law. We have much to learn from all this. In the past, 'English legal and political institutions . . . maintained the ideals of supreme and equal law for all members of the state,' said Holdsworth.²³³ But, in these days, things are not equal between the burglar and the milkman, the burglar has an advantage. Our 'common man' is proud of his law, and of the impartial justice of his Courts; but his legislators sometimes make it difficult for these Courts to do impartial justice.²³⁴ Jurymen and Justices do much to make the law, for they can refuse to convict innocence; their sense of justice, like their patriotism, though never flaunted, is seldom lacking. They may have learned to disregard, in a somewhat superior way, the immorality of crime; but they do not forget that it is immoral to convict innocent men. A conviction shows their moral disapproval; there can be no moral disapproval of innocent acts. Law is not divorced from morals; politics would be—had they ever been united.

²³³ 9 Holds. Hist. 411.

²³⁴ Farwell L.J. in *Conway v. Wade* [1908] 2 K. B. at p. 856.

In Memoriam.

PROFESSOR W. W. BUCKLAND.

THE lamented death of Professor Buckland has deprived the Cambridge Law School of one of its greatest scholars during the last two generations. His reputation as a Roman lawyer was established not only on both sides of the Atlantic and on the Continent, but also in every part of the World where the subject is studied. Moreover, this by no means marked the limits of his interest in, and knowledge of, law. As his colleagues and his former pupils fully realised, he was well acquainted with most of the branches of English law that came within the range of teaching at Cambridge, and he often discussed with the writer of this notice problems raised by judicial decisions in England and in the over-sea Dominions. No man carried his years more lightly. He passed from us when he was eighty-six, but he was younger at that age than many a man is at sixty-six. It was characteristic of his vigorous intellect that he produced last year "Some Reflections on Jurisprudence," and that only a fortnight before his death he gave me invaluable help on a series of difficult questions in the Civil Law. He had an inborn talent for going straight to the point, and a frank hostility to views founded on insufficient research or on pure speculation. His latest book was a striking illustration of this, for, while he fully recognised in it the wide interpretation put upon Jurisprudence by some of its expositors, he noted that in some respects their views related rather to matters extraneous to the law than to the analysis of law itself. Quite apart from his scholarship, his wide range of human interests and his kindness of disposition impressed all those who had the privilege of his friendship. One of my happiest recollections is a visit that I had with him to America. It was notable how easily he established social contact with our fellow-voyagers whom we had never met before.

Frederic Maitland was an intimate friend of his, and there was much in common in the outstanding services that both of them rendered to legal learning.

P. H. W.

NOTES ON RECENT CASES

ADMINISTRATION—SURVIVORSHIP—TESTATORS AND LEGATEES KILLED BY SAME
BOMB—LAW OF PROPERTY ACT, 1925, s. 184.

Hickman and Others v. Peacey and Others. [1945] A. C. 304.

During an air raid in 1940 a high explosive bomb exploded within a house, killing two brothers who were accustomed to take shelter in the basement. The deceased had bequeathed legacies to each other, but there was no evidence that either of them had outlived the other. The respondent, Peacey, as personal representative applied to the Court to determine whether the statutory presumption (contained in sect. 184 of the Law of Property Act) that the younger survived the elder, applied to such a case of simultaneous deaths. The decision of Cohen J. that the section did apply was reversed by a majority in the Court of Appeal (*sub nom. Re Grosvenor* [1944] Ch. 138). In the House of Lords it was held (Viscount Simon L.C. and Lord Wright dissenting): (1) that where no sequence of deaths was proved—and this included the case of simultaneous deaths—it was ‘uncertain which of them survived the other’ within the meaning of sect. 184, and the statutory presumption therefore applied; (2) that even if sect. 184 did not apply to simultaneous deaths, in this case simultaneity was not proved.

In the opinion of the majority (Lord Macmillan, Lord Porter, and Lord Simonds) ‘uncertainty’ in this context was not excluded by a preponderance of circumstantial evidence; and in this case there was a doubt. ‘If,’ said Lord Simonds, ‘simultaneity of death can in any case be inferred, this is not such a case’ (p. 346).

In practice, therefore, the section is applicable whenever there is no positive proof that one of the deceased survived the other; and in cases of ‘common disaster’ the burden of proof is so heavy that the statutory presumption is virtually irrebuttable. Can there be said to be any ‘uncertainty’ when the deaths were in fact simultaneous and proved to be such? Only by asserting the infinite divisibility of time. Despite Lord Simonds’ protestations to the contrary, their Lordships were forced to rely upon metaphysical arguments in order to reach a decision which convenience and good sense appeared to dictate.

The decision was justified by applying the ‘mischief rule’ of construction, but must be applied with discrimination. Its scope was soon limited in *Re Pringle* [1946] Ch. 124, where Cohen J. held that the phrase ‘simultaneous death’ as used in a will must be given its ordinary meaning. But where it is applicable, their Lordships’ decision, whatever its merits, will be welcomed as clarifying the law and preventing lapse.

E. J. A.

CONFLICT OF LAWS—ENGLISH CEREMONY OF MARRIAGE—PREVIOUS POLYGAMOUS
MARRIAGE OF HUSBAND RECOGNISED—DECREE OF NULLITY.

Srini Vasan v. Srini Vasan. [1946] P. 67.

The petitioner, a domiciled Englishwoman, went through a form of marriage in this country in 1936 with the respondent, a Hindu temporarily resident here though domiciled in India. Respondent had described himself as a bachelor, but inquiries instituted after his return home a year later revealed that in 1933 he had contracted a Hindu marriage with a native of his country.

This first wife being presumably still alive in 1936, the petitioner sought a decree of nullity of marriage. *Held*, that though the first marriage was by Hindu law potentially polygamous, English law must nevertheless recognise its validity, and accordingly the decree was granted. Barnard J. considered that his decision was counter to that expressed in the text-books (probably such observations as those in Dicey, 5th ed., p. 281, and Westlake, sect. 34, were present to his mind), but he found authority for his view in the speech of Lord Penzance in *Hyde v. Hyde* (1866) L. R. 1 P. & D. 130, and in that of Lord Maugham in the *Sinha (Peerage) Claim* (1939) 171 Lords Journals, 350.

An action for relief or enforcement of rights in respect of a polygamous union could obviously not be entertained by an English Court, with machinery adapted solely for monogamous marriages; but this case did not involve exercise of such matrimonial jurisdiction in its narrow sense, and Lord Penzance expressly disclaimed laying down a wider principle. As for public policy, any other decision in this case would result in the respondent being validly married to different wives in two countries. In short, 'To deny recognition . . . for the purpose in hand would . . . be to fly in the face of common sense, good manners, and the ordered sense of tolerance on which the Empire is based' (p. 70).

This concrete decision in what has been hitherto largely a realm of juristic speculation and dispute will be welcomed by the private international lawyer. Notwithstanding the statements of the above-mentioned writers and *dicta* in earlier cases (e.g., Stirling, J., in *Re Bethell* (1888) 38 Ch. D. 220, 234, and Lush L.J. in *Harvey v. Farnie* (1880) 6 P. D. 35, 53), it is suggested that this decision is in substantial accord with current opinion (as expressed in Cheshire, 2nd ed. p. 320), which considers that to disregard entirely polygamous marriages is inimical to the dominant purpose of private international law.

H. M. I.

CONTRACT—GUARANTEE—MARRIED WOMAN'S BANK ACCOUNT—HUSBAND UN-
DISCHARGED BANKRUPT WITH AUTHORITY TO DRAW ON THE ACCOUNT—CHEQUES
STOPPED—NO OBLIGATION ON CREDITOR TO DISCLOSE TO SURETY.

Cooper v. National Provincial Bank, Ltd. [1946] 1 K. B. 1.

The plaintiff guaranteed the account of a Mrs. R with the defendants, who did not divulge that a number of cheques drawn on the account had been stopped; that Mr. R was an undischarged bankrupt; and that Mr. R had been authorised by Mrs. R to draw on the account. The plaintiff sought to have the guarantee set aside, on the ground of non-disclosure.

Lawrence L.J. (sitting as an additional judge of the K. B. D.) held there was no duty voluntarily to disclose these facts. He cited the speech of Lord Campbell in *Hamilton v. Watson* (1845) 12 Cl. & Fin. 109, at p. 119: 'This might be considered as the criterion whether a disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and creditor, to the effect that his position shall be different from that which the surety might naturally expect.' Judgment was given for the defendants on the ground that there was no such contract between Mrs. R and the bank and that the matters complained of were not so unusual that a duty of disclosure nevertheless rested on the defendants. The learned Lord Justice observed that it might possibly have been otherwise if it had not really been the wife's account at all, but the husband's, and the bank had known this. The duty of disclosure in contracts of this nature of matters other than contracts within Lord Campbell's definition (*supra*) is strictly limited (see *Lee v. Jones* (1863) 17 C. B. N. S. 482). In *London General Omnibus Co. v. Holloway* [1912] 2 K. B. 72, Vaughan Williams L.J.

said (at p. 77) that a fact must be disclosed only if 'the non-disclosure constitutes a misrepresentation by reason of the non-disclosed fact being inconsistent with a presumed basis of the contract of suretyship.'

It is respectfully submitted that it may not be contrary to the authorities cited in this case and in the *London General Omnibus Co. v. Holloway*, to hold it inconsistent with a presumed basis of the contract of suretyship that any one other than the guaranteed debtor should draw upon the account. The effect of this decision may well be virtually to restrict the duty of voluntary disclosure to those arrangements which constitute contracts within Lord Campbell's definition.

P. S. A. R.

CONTRACT—ILLEGALITY—EFFECT OF OUTBREAK OF WAR ON PARTLY PERFORMED CONTRACT BY ENGLISH GUARANTORS TO PURCHASE BY INSTALMENTS SWEDISH CREDITOR'S RIGHTS AGAINST GERMAN DEBTOR—HELD: CONTRACT NOT ABROGATED.

Schering, Ltd. v. Stockholms Enskilda Bank. [1946] 1 All E. R. 36.

In February, 1936, a Swedish bank sold and transferred reichsmarks to a German firm, the price to be paid eight years thence. In April, 1936, the appellants, an English subsidiary of the German firm, who were parties to the first contract as sureties, contracted as principals with the bank to pay the debt on having a proportionate part of it assigned to them against each instalment, and pledged goods held by them as security. Instalments were paid up to September 3rd, 1939, when war broke out between Great Britain and Germany. In this action the English company claimed a declaration that their contract was abrogated by the outbreak of war, but the House of Lords (Lords Macmillan and Russell dissenting) re-affirming on different grounds the Court of Appeal's decision [1944] Ch. 13, *held*, that the present case fell within one of the exceptions mentioned by Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A. C. 260, 274, and the contract was therefore not abrogated. The only subsisting right to performance was that to the payment of the price, *i.e.*, a liquidated sum of money, in the nature of a debt. Lord Thankerton held this was so, even though the debt was payable by instalments, at a discount, and the creditor held security for it. The appellants were bound by the contract to acquire the debt before it ever became payable by the German firm, and the assignment was merely incidental to their payment of it. Lord Russell differed on the construction of the contract: in his view, it remained wholly executory on both sides, as on payment of each instalment, the bank was to assign a proportionate part of the debt.

No new principle was established by this decision, which re-affirmed the rule that in general the law of England does not confiscate the property of an enemy (*per* Lord Haldane, *Hugh Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie* [1918] A. C. 239, 247). A declaration by Simonds J. in the Court below, in favour of the appellants [1943] 1 All E. R. 418, was held contrary to the decision of the House in the *Ertel Bieber Case* as amounting to confiscation of the right to a debt which accrued to the bank on transfer of the reichsmarks. The distinction drawn by Lord Greene M.R. between contracts between British subjects and neutrals, and British subjects and enemies was repudiated as a matter of principle by Lord Thankerton, the paramount consideration of public policy was the same in either case. It is submitted that the significance of Lord Thankerton's speech lies in the adoption of Sir Arnold McNair's suggestion that the distinction between executory and executed contracts is unhelpful in determining the effect of war on contracts (McNair, *Legal Effects of War*, 2nd ed., 1944, p. 93), and in the attempt to define the phrase 'a liquidated sum of money which will be treated as a debt.' Only two previous decisions considered this point.

V. V. B. R.

CONTRACT—VENDOR AND PURCHASER—SALE BY PUBLIC AUCTION—MEMORANDUM SIGNED BY PURCHASER AND AUCTIONEER BEFORE PAYMENT OF DEPOSIT—WITHDRAWAL OF AUCTIONEER'S AUTHORITY BEFORE DEPOSIT PAID—LAW OF PROPERTY ACT, 1925, s. 40 (1)—HELD: THAT THERE WAS A SUFFICIENT MEMORANDUM WITHIN THE ACT.

Phillips v. Butler. [1945] Ch. 358.

At a public auction property was sold subject to special conditions providing that a deposit of 10 per cent. of the purchase price should be paid and that the National Conditions of Sale should apply where consistent with such special conditions. On the sale, two copies of the memorandum, which was also a receipt for the deposit, were signed by P, the plaintiff, as purchaser, and the auctioneer. Not having his cheque book, P offered to fetch it, but the auctioneer, knowing P as a man of means and integrity, refused this offer and asked P to post the cheque to him next day. This P did, but in the meantime the vendor had attempted to revoke the auctioneer's authority to conclude the sale. The deposit being held by the auctioneer as stakeholder, P sued for specific performance of a completed enforceable contract. It was held by Romer J. that a valid contract had been concluded at the fall of the hammer and that the memorandum signed by the auctioneer was sufficient evidence to satisfy the statute, so that a completed enforceable contract existed and specific performance was ordered. Romer J. pointed out that the case turned on whether the auctioneer had the authority of the vendor to sign the memorandum before the payment of the deposit, where both are required by the conditions of sale. Quoting Halsbury's Laws of England (2nd ed. vol. I, p. 699, para. 1150) as a completely correct statement of the law, he made it clear that the authority of the auctioneer to sign as agent for both vendor and purchaser is conferred by law and, once the bidding is completed, is irrevocable on both sides. It was further held that the memorandum, although in its capacity as a receipt for the deposit, it was in the nature of an escrow until the money was paid, was sufficient evidence to make the contract enforceable under sect. 40 (1) of the Law of Property Act, 1925.

The importance of this case lies in the distinction drawn between the acts required to complete a valid enforceable contract and those that merely fulfil, or do not fulfil, the conditions of that contract.

D. G. H.-D.

CRIMINAL LAW—MURDER—FELONY INVOLVING PERSONAL VIOLENCE—USE OF LOADED FIREARM A VIOLENT MEASURE—DEATH OF VICTIM CAUSED BY INADVERTENT DISCHARGE OF FIREARM HELD TO BE MURDER.

R. v. Jarmain. [1946] 1 K. B. 74.

J, armed with a revolver, entered a garage for the purpose of committing a robbery. He pointed the revolver at the cashier and demanded the money she was counting. On her refusal he passed the pistol to his left hand and cocked it twice to frighten her, thereby ejecting a live round, and introducing another live round into the breech. His finger was on the trigger which, according to his own evidence, he must have pressed inadvertently. Subsequently the cashier fell shot, J seized some money and ran away. J was convicted of murder.

The question on appeal was whether the fact that the firing was, or might have been, inadvertent created an exception to the rule that where a person, whilst committing a felony, did an act which was known to be dangerous to life, and likely in itself to cause death, and the death of another person resulted as a consequence of that act, though not intended by the person committing it, such person causing

the death was guilty of murder. The Court of Appeal dismissed the appeal. Wrottesley J., in delivering the judgment of the Court, said that the discharge of the pistol, even if involuntary, was only one element among many voluntary acts, such as the loading, cocking, and presentation of the pistol, of which the armed robbery was compounded. He concluded: 'We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim. For this purpose the use of a loaded firearm in order to frighten the person victimised into submission is a violent measure. The recent case of *R. v. Hulton and Jones*, decided in this Court, but not reported, is a clear authority for this proposition.'

This case follows a long line of precedents, notably *Director of Public Prosecutions v. Beard* [1920] A. C. 479, on this form of malice aforethought in murder, namely, intent to do a violent act which causes death in the cause or furtherance of a felony.

J. P. M. W.

CRIMINAL LAW—TREASON—ALLEGIANCE OF ALIEN HOLDING BRITISH PASSPORT ABROAD—ADHERING TO THE KING'S ENEMIES WITHOUT THE REALM.

Joyce v. Director Public Prosecutions. [1946] 1 All E. R. 186.

Joyce was convicted of treason by adhering to the King's enemies without the realm, contrary to the Treason Act, 1351. His appeal to the Court of Criminal Appeal was dismissed. He appealed to the House of Lords.

Lord Jowitt L.C., delivering his reason for dismissing the appeal, said that the important question was whether an alien, who had been resident within the realm, could be guilty and convicted in this country of treason committed abroad. An act to be treasonable must be committed by one owing allegiance to the King. The argument that Joyce could not commit treason while abroad was contrary to Foster's view that, in his absence, an alien's allegiance continued as long as his family or effects remained here. Although, in this case, neither his family nor effects so remained, Joyce was still under the protection of the Crown, having obtained a British passport, the possession of which gave rights and imposed duties which would not otherwise have been given or imposed. It was argued for Joyce that an alien outside the realm could not owe any duty, but the Lord Chancellor held that, while an alien held a passport, he was within the Act and could commit treason. An alien could withdraw allegiance on leaving the realm, but Joyce had made no sufficient attempt to do this. A state, in order to maintain its security, had jurisdiction concerning treasonable acts, whether committed within the realm or without.

Lord Macmillan, Lord Wright and Lord Simonds concurred.

Lord Porter dissented from the judgment and said he would have allowed an appeal. Although admitting that an alien under British protection was in the same position as a British subject, he held that the matter of continued allegiance depended on circumstances and should have been decided by the jury. He believed that Joyce's allegiance had terminated, in view of the fact that the passport was not found and of Joyce's statement that he intended to become naturalised in Germany and had accepted a post from the German State.

It is therefore clearly established that an alien holding a British passport cannot undertake treasonable activities with impunity. It is not clear what steps should be taken by such a person to establish that he has given up the protection of his British passport and has resumed the status of any ordinary alien not subject to the Treason Act.

R. P. E. C.

LANDLORD AND TENANT—LESSEE'S COVENANT TO EXCLUDE NAMED PERSON FROM CONDUCT OF RESTAURANT—ASSIGNMENT OF LEASE AND REVERSION—COVENANT HELD BINDING ON ASSIGNEES.

Lewin v. American and Colonial Distributors, Ltd. [1945] Ch. 225.

A let a restaurant to B. The defendant company was third party to the lease as surety. B covenanted for himself and his successors, *inter alia*, that S should have no interest in the lease, nor in any company concerned, nor in the conduct of the restaurant, under penalty of re-entry by the lessor. B subsequently assigned his interest to the defendants and later A assigned the reversion to the plaintiff. Notwithstanding this covenant, S was allowed to play a leading part in the conduct of the restaurant, to hold shares in the defendant company and to advance to it a large loan. There was thus a plain breach of the covenant, which the defendants were required to remedy. They contended that it was collateral and did not run with the land and therefore was not binding upon them as assignees. The plaintiff claimed forfeiture of the lease and damages.

Vaisey J. stated the established rule of law that to bind an assignee, a covenant must touch or concern the demised premises. To enforce such a covenant, a condition of re-entry correspondingly runs with the land. It was the lessee's duty to maintain at its full value the goodwill attached to business premises of this kind. The covenant concerning S, sensibly construed, restricted the user of the demised premises and must be examined in the light of authority. The following covenants had been held to bind assignees: to reside on the premises (*Tatem v. Chaplin* (1793) 2 H. Bl. 133), to conduct an inn properly (*Fleetwood v. Hull* (1889) 23 Q. B. D. 35), to buy ales for an inn from the lessors (*Clegg v. Hands* (1890) 44 Ch. D. 503), to buy wines from a particular wholesale merchant (*White v. Southend Hotel Co.* [1897] 1 Ch. 767), and to maintain a housekeeper (*Barnes v. City of London Real Property Co.* [1918] 2 Ch. 18). The learned judge found himself unable to distinguish the covenant in the present case from those in the cases cited *supra*. He also considered it arguable that as the assignees were *alio intuitu* parties to the deed itself they might be bound even if the covenant did not run with the land; on this point, however, he did not express a decided opinion. The defendants appealed, but the Court of Appeal unanimously dismissed the appeal, in effect on the grounds stated by Vaisey J.

The decision both reviews the existing law and applies it to new facts; it thus makes an interesting addition to the established examples of covenants in leases which are binding upon assignees.

H. J. A. A.

PERSONAL PROPERTY—BAILMENT—SERVICE FLATS—TRUNK, PROPERTY OF TENANT'S WIFE, DEPOSITED IN BAGGAGE ROOM—LANDLORD'S LIABILITY LIMITED BY TENANCY AGREEMENT—LOSS DUE TO LANDLORD'S NEGLIGENCE.

Andrews v. Home Flats, Ltd. [1945] 2 All E. R. 698.

A, the wife of a tenant of one of a block of flats owned by the defendants, was living in the flat. In 1942 A's trunk was taken to the baggage room by the servants of the defendants. No specific charge was made nor was any receipt given for the deposit of the trunk. Under the tenancy agreement there were incorporated certain 'conditions of letting'; the relevant words of condition No. 4 (d) were as follows: 'The landlord . . . shall be under no responsibility . . . for the loss, delay, or non-delivery of any letters, parcels, articles or messages entrusted to the landlord or the staff by or for the tenants.' When required in 1944, the trunk could

not be found in the baggage room. A brought an action in the county court and was awarded damages.

On appeal it was held: (i) on the true construction of the above condition, the trunk in question was not an 'article' entrusted to the landlord or his staff; nor did the condition apply to long-term deposits of luggage in the baggage room; (ii) the defendants were bailees for reward in respect of such goods belonging to members of a tenant's family which were deposited in their baggage room; (iii) on the facts the defendants were guilty of negligence due to failure to provide a system of control preventing loss. In dismissing the appeal Scott L.J. maintained that the limiting condition applied only to 'purely temporary' things like those specifically mentioned. He was also of the opinion that, despite lack of authority, for practical purposes we must treat the relationship of the landlord of a block of flats and the family of tenants as sufficiently satisfying the law about bailment for reward.

As is stated in the 'Editorial Note' in the report of the case, this decision is of considerable importance to landlords of service flats since there is no previous authority for the main point decided, namely, that the deposit of baggage for safe custody with the landlord by the tenant's family is within the relationship of landlord and tenant, so as to make it a bailment for reward. Also, it was held on the facts that the failure to have an efficient ticket system is a breach of that duty of reasonable care incumbent upon the landlord.

P. J. D.

PERSONAL PROPERTY—INNKEEPER—LIABILITY FOR LOSS OF GUEST'S PROPERTY—
QUESTION WHETHER LOSS CAUSED BY GUEST'S NEGLIGENCE.

Brewster v. Drennan. [1945] 2 All E. R. 705.

B was a guest at a small provincial hotel owned by D. The door of her bedroom had no lock. She mentioned this to D but was assured that her belongings would be safe. A valuable fur cape which she left hanging on the back of the door was stolen. The Court of Appeal held D liable, reversed the decision of the county court, and awarded B £177 : 10s. 0d. as damages. Scott L.J. emphasised that when B had remarked upon being unable to lock her door D in effect had said: 'Do not worry; nobody will steal here.' The question was whether in those circumstances the loss was due to the guest's negligence, within the law as laid down in the House of Lords by Lord Macmillan in *Shacklock v. Ethorpe, Ltd.* [1939] 3 All E. R. 372 (noted in 7 Cambridge Law Journal, p. 271). The Court of Appeal held that in such a hotel B's act in leaving the cape would not necessarily be negligent, and that, on the facts of this case, having regard to the conversation between B. and the innkeeper, it was 'quite impossible to say that she was guilty of any negligence.'

At common law an innkeeper is virtually an insurer, for his liability exists quite apart from any negligence on his part. This liability is founded, in the words of Lord Esher M.R. in *Robins & Co. v. Gray* [1895] 2 Q. B. at p. 503, 'not upon bailment, or pledge, or contract, but upon the custom of the realm.' In an old case, *Reniger v. Fogossa* (1552) 1 Plowd. at p. 9, it was put thus in the course of argument: 'By the common custom of the realm, hosts shall be charged for the goods of their guests lost or stolen out of their houses.' Proof that the loss was caused by the guest's negligence, however, is a good defence. Whether conduct on the part of the guest amounts to negligence depends in part 'upon the state of society at the time and place,' to use the phrase of Montague Smith J. in *Oppenheim v. White Lion Hotel Co.* (1871) L. R. 6 C. P. at p. 522, adopted by Lord Macmillan in *Shacklock's Case*. Failure to lock a bedroom door or to leave valuables with the management is not necessarily negligence.

J. M. R.

TORT—CONVERSION—POSSESSION OF LOST CHATTELS AND RIGHTS OF FINDER.

Hannah v. Peel. [1945] K. B. 509.

P became owner of a house in 1938, but never occupied it until the end of 1940. In July, 1940, the house was requisitioned. In August, 1940, H, a lance-bombardier, lawfully on the requisitioned premises, found a brooch, the owner being unknown. He handed it to the police, who, failing to trace the owner, handed it to P; P sold it. H. sued P in trover. *Held*, H. was entitled to recover the amount for which the brooch had been sold.

It was argued for H that, as finder, he was entitled to the brooch as against everyone except the true owner, who was unknown. For P, it was argued that, as freeholder of the land on which the brooch was found, he was entitled to possession of it, except as against the true owner. Birkett J. giving judgment, said the law on this point was confused. In *Bridges v. Hawkesworth* (1851) 21 L. J. Q. B. 75 (on which the plaintiff relied), the finder was held entitled to the goods as against the shopkeeper, who was owner of the property on which they were found, the *ratio decidendi* being that the goods were never in the custody of the shopkeeper nor within the protection of his house, before being found. Mr. Justice O. W. Holmes, Sir Frederick Pollock, and Sir John Salmond considered the case rightly decided; Professor Goodhart does not. However, the occupier of the land clearly does not always possess an unattached thing found on his land, even though the true owner had lost possession. *South Staffordshire Water Co. v. Sharman* [1896] 2 Q. B. 44, 47, on which the defendant relied, could be distinguished; there, the finder obtained the goods for his employers, as servant or agent, and could not claim title for himself. Quoting Salmond's view that, with certain exceptions, the finder acquires title as against the landowner, Birkett J. accepting the *ratio decidendi* of *Bridges v. Hawkesworth* as applicable, gave judgment for the plaintiff. *Bridges v. Hawkesworth*, on which this decision is based, is controversial. Professor Winfield agrees with Professor Goodhart that it might well be overruled (Law Quarterly Review, 1945, at p. 334), and suggests that Birkett J. might have based his decision on the simple ground that P, although owner of the house, was never in possession of it until after the brooch was found.

D. E. W.

TORT—DEFAMATION—SLANDER ACTIONABLE PER SE—LIMITED LIABILITY COMPANY—WORDS CALCULATED TO HARM BUSINESS REPUTATION—IMPUTATION OF CRIME PUNISHABLE CORPORALLY.

D. & L. Caterers, Ltd. and Jackson v. D'Ajou. [1945] K. B. 364.

The plaintiff company carried on the business of a restaurant. The defendant published a slander of them, saying that they traded contrary to the Ministry of Food's regulations, and implying that they bought in the 'black market.' Such offences were punishable, in the case of an individual, by imprisonment.

The defendant pleaded that (1) a company, since it was not corporally punishable, could not without proof of special damage sue for a slander imputing a crime punishable by imprisonment; (2) nor could it do so for a slander calculated to injure its business reputation.

Stable J. found for the plaintiffs on both points. On appeal the Court reserved the first question for future decision; and upheld Stable J. in regard to the second. The appellant argued that there was no precedent for such an action. Although an individual could sue for a slander affecting his business without proof of special damage, the exception was arbitrary and ought not to be extended. Moreover in

S. Hetton Coal Co. v. N.-E. News Association Ltd. [1894] 1 Q. B. 133, two of the Court had appeared to imply that the exception was limited to individuals. Lord Goddard saw no reasons on general grounds why the law should not be the same for a company as for an individual. Du Parcq L.J. said that the *S. Hetton Coal Co.'s Case* showed that a company could sue for libel without proof of special damage, where the libel affected its business. The Court had not actually stated that the same rule applied in slander, but they had not been concerned with it.

It is curious that the question should not have been raised before. There are four types of slander of an individual actionable *per se*, viz., imputations: (1) of crime punishable at least by imprisonment; (2) of contagious disease; (3) of unchastity in a woman; (4) of unfitness in one's trade or profession. Of course the second and third did not apply to a limited company; this case establishes that the fourth does so apply, while leaving open the question whether the first does or not.

H. V. B.

TORT—DEFAMATION—SLANDER ACTIONABLE PER SE—IMPUTATION AFFECTING PROFESSIONAL ABILITY.

Hopwood v. Muirson. [1945] K. B. 313.

F was requested to furnish a reference to the defendant M, his prospective landlord. He obtained one from the plaintiff, H, a solicitor, who was a friend of his. The reference was signed 'C. R. Hopwood, Solicitor.' On receiving the reference from F, M said: 'You have got one' [a reference] 'from that pimp Hopwood. It is quite useless. His very calling as a solicitor makes him write whatever suits his clients best. Damn it, he would sue his grandmother for 7s. 6d.'

H brought an action for slander, alleging that the words were spoken of his conduct in his office and were actionable *per se*. Hallett J. held that the words were not defamatory of the plaintiff. That even if they were defamatory special damage must be proved as they did not relate to his conduct in his office. H appealed. The Court of Appeal thought the words were defamatory of H in that they implied that he would say anything by way of reference that he thought would suit his clients, whether true or untrue. However, they agreed with Hallett J. that the words were not actionable *per se*. The Court refused to extend the scope of the principle applied in *Jones v. Jones* [1916] 2 A. C. 481, at p. 500 (Lord Sumner). Thus, an imputation of dishonest or dishonourable behaviour to a professional man, even if likely to affect adversely the conduct of his business, is not enough, unless the words refer to misconduct in some act normally part of his profession. 'The giving of references for prospective tenants,' even if they are his business clients, 'is no part of the avocation of a solicitor.' The slander was 'on the solicitor as a man, not on the man as a solicitor' (Uthwatt J. at p. 323). The case of *De Stempel v. Dunkels* (1937) 158 L. T. 85, was said to lay down no new principle. It was decided on special facts. In the circumstances the statement made about De Stempel to his employers rendered him incapable of continuing his employment satisfactorily (Lord Goddard, at p. 318). It may be submitted that in the present case the defendant's statement might have a somewhat similar effect on the satisfactory conduct of the plaintiff's business. The decision is another example of the artificial distinctions which characterise the law of slander. It seems to limit the decision in *De Stempel v. Dunkels* (*supra*) to very similar facts, and to affirm the narrow scope of the rule as defined in *Jones v. Jones* (*supra*).

F. E. K.

TORT—FALSE IMPRISONMENT—ARREST WITHOUT WARRANT FOR MISDEMEANOUR—
FAILURE TO SATISFY CONDITIONS OF LOCAL ACT AUTHORISING ARREST WITHOUT
WARRANT ON CHARGE OF UNLAWFUL POSSESSION—HELD: SUBSEQUENT CHARGE
OF LARCENY WAS NOT AVAILABLE AS A JUSTIFICATION.

Leachinsky v. Christie. [1946] 1 K. B. 124.

L, the plaintiff, whose address was known to the police, was arrested and detained by officers of the Liverpool police force, including the defendant C, and charged under the Liverpool Corporation Act, 1921, with 'unlawful possession' of a bale of cloth. The Act authorised arrest without a warrant on such a charge only when the name and residence of the person arrested were unknown and unascertainable. The charge was dismissed, but before leaving the Court L was re-arrested by C; no fresh charge was preferred at the time. Later the Leicester police charged L with larceny and took him to Leicester with a view to his committal for trial. The charge of larceny was dismissed. L sued C and other officers of the Liverpool police for false imprisonment. The defendants pleaded statutory authority, and later set up also the common law plea of reasonable suspicion of felony.

The Court of Appeal held that as the name and address of the plaintiff were known to the police, the arrest was not authorised by the Liverpool Corporation Act. The main question considered was whether a subsequent charge of felony may give *ex post facto* validity to a previous wrongful arrest without warrant for a misdemeanour. The Court, by a majority (Lawrence L.J. dissenting), followed *Dumbell v. Roberts* [1944] 1 All E. R. 326, and held that the common law plea of justification is available only when the person arrested is charged with a felony at the time of arrest; that if prosecution of that charge is abandoned, the person charged must be released, and cannot be detained pending the putting forward of a different charge; and that (as Uthwatt J. said at p. 412) it follows that a person cannot be lawfully arrested for a misdemeanour because the constable reasonably suspects him of committing a felony.

Scott L.J., in a detailed investigation of the law, emphasised the importance of the questions considered, as affecting the freedom of the individual from arrest at the discretion of the executive, and the right of action for any unauthorised arrest or detainment.

E. M. S.

TORT—MASTER AND SERVANT—COMMON EMPLOYMENT—LIMITS OF EMPLOYER'S
LIABILITY TO PROVIDE A SAFE SYSTEM OF WORK.

Colfar v. Coggins and Griffith (Liverpool), Ltd. [1945] A. C. 197.

A dock labourer was injured while stowing bags of salt in the hold of a ship. The bags were being lifted from a barge alongside the ship by two derricks working in 'married gear'—a system which involved the fixing of one derrick arm in an outward position by a guy-rope so that it could not swing inboard. Work was interrupted, and when it began again the guy-rope should have been re-fastened. Owing to the negligence of a fellow-servant, the derrick arm was never secured. It swung inboard with the result that some bags of salt fell out of the sling into the hold and injured the labourer.

An action brought by the labourer against the respondents, his employers, for negligence in that 'they failed to provide and maintain a proper system of work' was dismissed by Stable J. who concluded that the negligent servant was in common employment with the appellant. The Court of Appeal and the House of Lords affirmed this decision.

C.L.J.

Viscount Simon L.C. considered the case an obvious example of common employment since the injury was caused solely by the careless act of a fellow-servant. *Radcliffe v. Ribble Motor Services* [1939] A. C. 215, established that for the doctrine of common employment to apply the workmen must be engaged on work which involves juxtaposition and exposes one of them to risk in the event of negligence by another. It is not available as a defence if the employer has failed to provide a safe system of work (*Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. 266), or if he fails to see that the safe system is properly used (*Weems v. Mathieson* (1861) 4 Macq. H. L. 215, 226; *Wilsons and Clyde Coal Co. v. English* [1938] A. C. 57). In *Speed v. Thomas Swift & Co., Ltd* [1943] K. B. 557, the Court of Appeal considered the meaning of the employer's 'duty to provide a safe system of working,' and in Lord Simon's opinion, as long as the doctrine of common employment continues to apply the employer's liability cannot be further extended, although he agreed with the propositions laid down in *Speed's Case*.

Mackinnon L.J. in *Speed v. Thomas Swift & Co., Ltd* [1943] K. B. at p. 569, castigated the doctrine of common employment as one 'which lawyers who are gentlemen have long disliked,' and referred to the 'mitigating and ameliorative task of the House of Lords.' *Colfar's Case* confirms the doctrine of common employment, and puts no further limit on it.

M. H.

TORT—MASTER AND SERVANT—HIRING OF VEHICLE AND DRIVER—NEGLIGENCE OF DRIVER CAUSING INJURY TO THIRD PERSON—LIABILITY OF REGULAR EMPLOYER OR OF HIRER.

Dowd v. W. H. Boase & Co., Ltd. [1945] K. B. 301.

Rea, Ltd. were under contract to unload frozen meat from a ship at Liverpool. They hired from Boase & Co. a bogie with the services of its driver, D, to assist with the unloading. While the plaintiff, an employee of Rea, Ltd., and another man were unloading meat from D's bogie into a van, D, mistakenly thinking that they had finished, drove his bogie away. As a result, Dowd, who had one foot on the bogie, fell and sustained injuries. He brought actions against Boase & Co. and Rea, Ltd. Stable J. held he could not recover against either, on the ground that D was in the employment of Rea, Ltd. when the accident occurred, and thus he and the plaintiff were in common employment. The plaintiff appealed, contending that D was in the employment of Boase & Co. at the time of the accident.

The Court of Appeal, allowing the appeal, said that where a vehicle has been let out with the services of its driver, and an accident is caused through the driver's negligence, if his regular employers wish to contend that they were not his employers at the time of the accident, the onus is on them to prove this. Here they had failed to do so. The test to be applied in such cases was that suggested by Scott L.J. in *Nicholas v. F. J. Sparkes & Son* [1945] 1 K. B. at p. 312 (decided in 1943, and reported in a note at the end of *Dowd's Case*): 'In the doing of the negligent act, was the workman exercising the discretion given him by his general employers, or was he obeying or discharging a specific order' of the hirer? If the former, his general employer is liable; if the latter, the hirer is liable. Here they found D was exercising his own discretion as driver, for though Rea, Ltd. had considerable control over him, and could tell him where to go, he had entire control of the actual driving of the vehicle.

The phrase 'specific order' used in the above test probably means telling the workman not merely what to do, but how to do it. It has been suggested that this test is useful enough to be applied to other cases besides the loan of vehicles.

W. A. E.

TORT—NEGLIGENCE—EMERGENCY LEGISLATION—AIR-RAID SHELTER ERECTED ON HIGHWAY BY LOCAL AUTHORITY UNDER STATUTORY POWERS—SHELTER UNLIGHTED—COLLISION OF MOTORIST WITH SHELTER—DUTY OF LOCAL AUTHORITY.

Fisher v. Ruislip-Northwood Urban District Council. [1945] K. B. 584.

The plaintiff was injured when a motor-car which he was lawfully driving at night on a highway collided with an unlighted air-raid shelter, erected on the highway by a local authority in pursuance of their statutory powers under the Civil Defence Acts, 1937 and 1939. Street lighting was prohibited at that time, but the shelter might have been lit by red lamps at each corner, and sometimes was so lit. The defendants admitted that if they owed any duty to the plaintiff they had been negligent in failing to light the shelter, but it was contended that they owed no such duty. Macnaghten J. held, following *Fox v. Newcastle Corporation* [1941] 2 K. B. 120, that the defendants were under no duty to light the shelter. The Court of Appeal, in allowing the appeal, held that local authorities were always under a duty to take reasonable care to prevent danger to the public from obstructions erected on the highway under statutory powers, and the date of the erection of the obstruction, and the purpose for which it was used, were (apart from special circumstances, or special language in the statute), immaterial. So long as the streets were properly lit, the duty was *ipso facto* performed, but when the street lighting was suspended for any reason it became the duty of the local authority to take such steps to safeguard the public, by special danger lights or otherwise, as in the circumstances of the case were reasonably possible. In this respect there was no distinction between obstructions erected under a statutory power and those erected under a common law power.

This case is a good illustration of the application of the ruling of the Court of Appeal, laid down in *Young v. The Bristol Aeroplane Co.* [1944] K. B. 718, that the Court of Appeal, though bound by its previous decisions, can choose between them if they conflict. Lord Greene M.R., in refusing to follow *Wodehouse v. Levy* [1940] 2 K. B. 561; *Lytus v. Stepney Borough Council* [1941] 1 K. B. 134; and *Fox v. Newcastle Corporation* [1941] 2 K. B. 120, said (p. 617): ‘ . . . as I am entitled to select between the conflicting authorities in this Court, I unhesitatingly prefer not to follow the three cases in question.’

M. N. M.

TORT—NEGLIGENCE—LICENSEE ON VEHICLE—CONCEALED DANGER—DUTY OF LORRY DRIVER TO WARN LICENSEE—LIABILITY OF HIGHWAY AUTHORITY.

Lewys v. Burnett and Dunbar and Another. [1945] 2 All E. R. 555.

X, the plaintiff's husband, was killed as the result of an accident which occurred while he was travelling as a passenger in a motor lorry. He was standing up in the lorry when it passed under a railway bridge, which struck his head. To the knowledge of B, the lorry driver, and D, his mate (the first two defendants), but not to that of the deceased, the headroom under the bridge was 8 ft. 9 ins. It had originally been 9 ft. 3 ins., but in the course of maintenance, the third defendants, the highway authority, had raised the level of the road 6 ins. Neither B nor D warned the plaintiff's husband that it was not safe for him to stand up in the lorry, and despite a similar accident in 1940, the third defendants had done nothing to increase the headroom.

In an action for damages under the Fatal Accidents Act, Croom-Johnson J. held that B and D were guilty of negligence in not warning the passenger of the danger; and that the third defendants were guilty of negligence in the exercise of their

statutory powers of repairing the road and of nuisance in having repaired the road so as to raise its level under the bridge. The learned judge adopted the distinction between a bare licensee as such (*per* Farwell L.J. in *Latham v. Johnson (R.) and Nephew, Ltd* [1913] 1 K. B. 398, and a bare licensee, who is being carried (*per* Parke B. in *Lygo v. Newbold* (1854) 9 Exch. 302), drawn by Collins M.R. in *Harris v. Perry & Co.* [1903] 2 K. B. 219; holding that, although the lift was gratuitous, B and D were bound to exercise reasonable care towards their passenger to the extent of warning him of dangers of which they must have known and of which he did not know; and that if, as in this case, such warning was not possible after the passenger was on board, the duty commenced before he actually entered the vehicle.

The highway authority, though not bound by the provision of the relevant railway Act to leave a minimum of headroom under the bridge, were liable upon the principle in *Shoreditch Corporation v. Bull* (1904) 68 J. P. 415, that a highway must be restored to such a condition that it may be used by the public without undue risk.

This case is of importance with regard to the giving of gratuitous lifts, as it imposes on the drivers of vehicles a considerable duty towards their passengers, breach of which duty constitutes actionable negligence.

P. L. P. M.

BOOK REVIEWS

Learning the Law. By GLANVILLE L. WILLIAMS, M.A., LL.B., Ph.D.
London: Stevens & Sons, Ltd. 1945. vii and 156 pp. (7s. 6d.)

Dr. Glanville Williams' object in writing this book has been to give to the Law student the sort of instruction in legal technique that a good teacher imparts to his students. That he is exceptionally well qualified to perform this task is self-evident, for his own erudition is phenomenal and his success as a teacher is proved by the enthusiastic testimony of his pupils; and if, influenced by his own experience as a student, he is inclined to set the standard high for undergraduates in general, this may be all to the good, for the sooner the would-be lawyer realizes that the Common Law is an exacting task-mistress, the better it will be for him.

Apart from the first two chapters, which contain a brief introduction to the English legal system, and the last chapter, which discusses the careers open to those with legal qualifications, the rest of the book is devoted to telling the student how to set about mastering the law and preparing himself for his examinations. First of all he is told how to find his way about in a law library and where to look for the cases and the statutes. Then comes a chapter on Methods of Study, where the author discusses very frankly with the student such questions as how he should divide his time between his text-book and the reading of cases, and the value, if any, of attendance at lectures. The importance of some knowledge of English history is rightly emphasised, but even if a student does not possess this modest equipment he will henceforth have no excuse for not knowing at any rate the Kings and Queens of England in chronological order. On the other hand, the fact that it is unsafe to assume even an elementary knowledge of English history makes one wonder whether it may not become necessary to broaden our conception of university legal education so as to include some study of history and of the social sciences if the lawyer is to play a constructive part in modern society.

Perhaps the most notable chapter in the whole book is that which explains the technique of case law. It tells how to distinguish the wheat from the chaff and it should greatly help the reader to see how the system of judicial precedent actually works.

No doubt, the sections which students will be most eager to digest will be those which tell them how to prepare themselves for their examinations and how to conduct themselves to the best advantage during those ordeals. Here they will find much valuable advice about all kinds of matters great and small, and all presented in very palatable form. Generally the author's advice will be cordially indorsed by all teachers and examiners, but on the best way to master a legal text-book there may well be differences of opinion, and it would be interesting to know the views of other members of the Cambridge Law Faculty on this matter. Dr. Williams' advice is to read a text-book again and again and not to attempt to digest its contents in writing, which he considers to be a waste of time. In support he cites the authority of Dr. Johnson, but to this it may be objected that though endowed with excellent science and great endowments of nature, the great sage was not learned in the laws of the realm of England, and there are weighty judicial pronouncements to the contrary.

The last chapter deals with the careers open to persons with legal qualifications. This will be of particular value to the men and women who will be returning from the Forces.

Here is a little book which every law student would do well to possess, for he will find it an instructive and often entertaining companion during the whole of the

period when he is learning his law. It will help him, not only to pass his examinations, but also to become a competent lawyer who knows how to handle the tools of his trade.

D. J. LL. D.

Learning the Law. Second Edition. By GLANVILLE L. WILLIAMS, M.A., LL.B., Ph.D., of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1945. xii and 161 pp. (7s. 6d. net.)

The first edition was published in January, 1945, the second in September; these facts speak for themselves. The task of learning the law will be considerably lightened to all who start with this. Here is a kindly light to lead the beginner through the maze of Courts and their history; statutes, precedents and text-books; examinations and how best to cope with them; and much other useful material that has to be known in that long journey that starts with learning and normally ends with earning.

The Modern Approach to Criminal Law: Collected Essays. By D. SEABORNE DAVIES, R. M. JACKSON, C. S. KENNY, L. RADZINOWICZ, W. T. S. STALLYBRASS, J. W. C. TURNER, E. C. S. WADE, B. A. WORTLEY. Macmillan & Co. 1945. ix and 511 pp. (21s. net.)

The essays collected in this volume offer a series of variations upon two main themes: the exposition of Criminal Science as an individual and challenging facet of social thought, and an examination of the main trends of English Criminal Law. It is, I hope, no injustice to the other learned contributors to say that the main burden is borne by Dr. Radzinowicz and Mr. Turner.

After a pious tribute to Professor Kenny, Dr. Radzinowicz and Mr. Turner begin at once to 'determine the province' of Criminal Science. They recognise three branches: Criminology, itself sub-divided into Criminal Biology and Criminal Sociology and representing the reciprocal effects of personality and environment, Criminal Policy, the study of the State in its approach to crime, and Criminal Law. I am not quite happy in the subordinate function allotted to the last. Analytically it is doubtless of lesser interest: politically it is almost of paramount importance. As Professor Kenny suggested in his criticism of Lombroso, a certain economy of truth must be observed if the public mind is to be convinced that justice is being done, and the public eye is inevitably focussed upon the rules of criminal law. But the authors of the present volume have, of course, to emphasise the two other branches of their science to overcome the ignorance and inertia which still require to be dispelled.

I feel myself too much an amateur to hazard criticism which may be as ill-informed as it is ungrateful. But I venture, upon this first theme of the book, to offer three tentative comments. While I share the scepticism of Dr. Radzinowicz on the value of available criminal statistics, I would welcome a fuller and more individual account of the Borstal Institutes than he was able, in the space at his disposal, to afford. I find myself in the second place, wondering if he and Mr. Turner are right in dismissing retribution as an obsolete factor in the problem of punishment. Is the instinctive desire for vengeance 'exploded'? Does it play no part in the emotional re-action to crimes of brutality? How otherwise are the present trials of 'War Crimes' to be justified? No one surely will pretend that these are likely to deter future war-makers. In the third place, I am not sure that the old antitheses between *mala prohibita* and *mala in se* is as absurd as Mr. Turner suggests. It is significant that, while, in their analysis of criminal science, both he and Dr. Radzinowicz stress the importance of personality, the modern State is so cumbered

with 'administrative offences' from which personality is absent that the whole attitude of the citizen both to criminal law and to the Police Force is slowly but surely being altered. Irritation against 'controls,' 'regulations' is being converted into impatience with criminal justice as a whole. In truth, it is not so easy as is sometimes suggested to divorce a system of administrative law and an authoritarian state.

In the examination of current English criminal law, the long essay of Mr. Turner on the Mental Element in common law crimes is of exceptional importance. He traces the source of much judicial confusion to two causes: on the one hand, the failure to distinguish the question whether the defendant's conduct has been voluntary or involuntary from the question whether he has realized the possible consequences of his acts, and, on the other hand, the constant and unhappy pre-occupation with the idea of negligence. He is surely right to demand the elimination of this concept from criminal liability. It is a tribute to the suggestive qualities of this and the other essays upon the second theme of the book that I am tempted to be importunate. I should like to have read Mr. Turner's comments, in his essay on 'Two Cases of Larceny,' upon the more recent case of *R. v. Hudson*, and to have asked Mr. Jackson whether, in view of *Director of Public Prosecutions v. Kent and Sussex Contractors* and of *R. v. I. C. R. Haulage, Ltd.* he would maintain his statement on p. 269 that 'there is still [in statute law] a presumption that *mens rea* is essential?' At least these two latter cases give colour to Mr. Turner's observations, at p. 230, on the 'inadvertent' elimination of *mens rea*.

I cannot end without thanking the learned contributors to this book for the light they have shed on old problems and for the interest with which they have invested a new science. The book should be read by all, lawyers and laymen alike, who are interested in social studies.

C. H. S. F.

A Guide to the Practice of International Conferences. By V. D. PASTUHOV.
Washington: Carnegie Endowment for International Peace. 1945.
272 pp. (\$2.50.)

This technical but well-written and readable book fills a substantial gap in the literature of international law and relations. It does not supersede the useful and scholarly contributions to the subject published in 1926 by Professor Hill and in 1929 by Professor Dunn. But it deals with it in a somewhat more practical manner—a method which is bound to make the book specially attractive for the officials of international organizations and of foreign offices engaged in the preparation and in the management of international conferences. Part I of the book is devoted to a description of the successive preparatory stages of conferences. It ends with a suggestive note on the dangers of over-preparation. Part II deals with the organization and the direction of the conference, of its committees and its secretariat. There follows a detailed discussion of such questions as the languages of and the voting at the Conference, minutes, and the form of final documents. There are a number of useful Appendices. Dr. Pastuhov has not aimed at a critical discussion of most of the questions involved. Thus, for instance, he confines himself to a purely matter-of-fact account of the procedure of voting without attempting to illuminate the major issue involved in the question. But within its limited compass the book is a much needed and welcome contribution to the subject.

H. L.

Military Occupation and the Rule of Law. By ERNST FRAENKEL. Occupation Government in the Rhineland, 1918—1923. Oxford University Press. 1944. xi and 267 pp. (16s.)

This is a careful account of the first five years of the administration of the Rhineland in accordance with Article 428 of the Treaty of Versailles, which provided that certain parts of German territory shall continue to be occupied by the Allied forces as a guarantee of the execution of the Treaty of Germany. The author describes the organisation of the occupying power, its relations with the authorities of occupied territory, the administration of justice, the jurisdiction of the occupying powers and judicial review by the Courts of the occupied territory. There is also an interesting chapter on prosecution of war criminals. One of the reasons that prompted the composition of the book, which makes use of some hitherto unpublished material, was the belief that the experience of the Rhineland administration may provide some constructive lessons for the forthcoming occupation of Germany by the Allies. Among the objects of that occupation should be, in the author's view, a gradual restitution of the rule of law violated by the defeated régime. But he admits that the situation after the First World War is not comparable, in many material respects, with that in and after 1944. In 1919 the occupying authorities were confronted with the law of a civilized state which, except as necessitated by the exigencies of the occupation, remained in force. In September, 1944, the object of the first law promulgated by the Supreme Commander was 'to eliminate from German law and administration within the occupied territory the policies and doctrines of the National Socialist Party' and 'to restore to the German people the rule of justice and equality before the law.' The interpretation and application of German law in accordance with National Socialist doctrines were prohibited. It was expressly laid down that decisions of German Courts and legal writings supporting or applying National Socialist objectives and doctrines shall not be referred to or followed as authority for the interpretations of German law.

Dr. Fraenkel's chapter on the prosecution of war criminals in the occupied territory is concerned largely with the plea of superior orders. In 1944 the enormity of the crimes committed during the Second World War necessitated a clear cut ruling, which, when given, was fully in accordance with a principle of law generally adopted in civilized States. Long before the Agreement for the Prosecution of War Criminals of August, 1945, eliminated the defence of superior orders as a valid plea, an Ordinance of the Military Government laid down that it shall not be a defence that the offence charged was committed under orders of any civil or military superior. But Dr. Fraenkel's chapter on the subject is not devoid of interest. This applies in particular to his account of the criminal prosecution of Rhenish industrialists who were found in possession of French or Belgian machinery.

H. L.

The Pure Theory of Law. By WILLIAM EBENSTEIN. Madison: The University of Wisconsin Press. 1945. 211 pp.

To attempt to present to the English-speaking reader the 'pure theory of law' of Kelsen and of other legal philosophers of the Viennese School is a hazardous and difficult undertaking. But the reviewer has no doubt that Dr. Ebenstein has succeeded in giving the most competent and satisfactory account in the English language of that school of jurisprudence. This is not to say that Dr. Ebenstein's book is the most readable book on the subject that could be produced. Professor Kelsen's theories do not in any case easily lend themselves to presentation in a language familiar to the average lawyer, and it is not certain that the author of this scholarly book could not have gone further in making the 'pure theory of law' more attractive to the general reader. However, in conjunction with Professor

Kelsen's *General Theory of Law and State*—a comprehensive treatise published in 1945 and giving a full picture of the Pure Theory of Law—the present book ought to go a long way towards making it better understood in English-speaking countries than is the case at present. Kelsen's general influence has so far been stimulating and beneficent in many a sphere. This is so although not all of his tenets can be accepted and although in some, as in his interpretations of natural law as an ideology supplying a justification for positive law, however unjust and tyrannical, Kelsen hardly does himself justice.

Dr. Ebenstein has successfully expended much labour in bringing the pure theory of law into relation with Anglo-American juristic and political thought. This applies in particular to the last chapter on the results of a 'Steps-and-Stairs' theory of law in which the author discusses the controversy as to the meaning of the rule of law in relation to the criticisms of Dicey's views on the subject. Perhaps the most valuable part of the book is the chapter on Law and Legal Positivism. Other chapters are devoted to a discussion of the philosophical basis of the pure theory of law and of the central doctrine of the unity of the law.

H. L.

The British Year Book of International Law, 1944. Vol. 21. London: Humphrey Milford (Oxford University Press). 1945. vii and 272 pp. (25s. net.)

After an interval of six years, Professor Lauterpacht, the editor, has decided to resume the publication of this Year Book which is devoted to the study of Public and Private International Law. Professor Gutteridge discusses the value of Comparative Law for the development of the Law of Nations. In a balanced survey, he arrives at the conclusion that rather than furnish international judges with additional rules deserving the attribute of 'general principles recognized by civilized nations,' comparative law should be useful 'as a corrective to any tendency . . . on the part of international judges and lawyers . . . to employ concepts or rules which either belong exclusively to a single system or are only to be found in a few of such systems.'

The reader of Dr. Mann's important and stimulating article on the law governing State contracts does well to keep these observations in mind. For Dr. Mann advocates, first, that such contracts, if concluded between States and individuals, should be taken out of the sphere of private law, into which they fall, and be 'internationalized.' They would then be governed by international law, and more specifically speaking, by the 'general principles of law' recognized by art. 38 of the Statute of the Permanent Court. However, since international law contains no branch dealing with contracts, it is difficult to see how such a law of contracts can be derived from one of its sources. The Permanent Court itself reached this conclusion implicitly when in the *Serbian and Brazilian Loan Cases*, it treated the dispute as one outside the sphere of international law and applied municipal law on the basis of a system of Private International Law of its own. Dr. Mann's 'internationalized contract' would be governed by an artificial, super-national law of contract, to be ascertained by the comparative method. It may be doubted whether a 'greater degree of certainty would be achieved thereby than under the present system of choice of law, however deficient the latter may be. If a claim under a State Contract is to be made the object of a reclamation under international law the appropriate remedy is to be found in the claim for state responsibility on the ground of denial of justice in the narrower or the wider sense.

Second, with regard to treaties of a commercial character, Dr. Mann argues that they are often subject to private law determined by the ordinary rules of private international law. The reviewer admits that treaties, like contracts, may incorporate provisions of foreign municipal law, but it would seem that their interpretation

validity and termination remain subject to the formal law of treaties, which has not developed any provisions comparable to the intricate pattern of municipal systems of contract law, except perhaps in the matter of duress and illegality. If States wish to conclude arrangements which are contracts not only in substance but also in form, they must act through commercial corporations, delegations and agencies.

Mr. Beckett, in a useful and well-documented article, examines the international practice relating to consular immunities. He holds that, apart from the immunity of their archives, consuls themselves enjoy exemption from local jurisdiction for official consular acts. Under the title 'Vital Interests and the Law' Prof. Brierly develops ideas which he first stated in his book 'The Outlook for International Law.' In his view the existence of vital interests is intimately connected with the unique nature of States and has its origins in the insecurity of the existing order. Compulsory jurisdiction cannot promote a better order, since it is not law that creates order but order that creates law. However, since order presupposes some form of organisation, the impasse would appear to be insoluble, unless order is identified with brute force applied by individual states or by one supereminent State. In these circumstances the nature of the rules which are to be applied seems to be of secondary importance and the course would appear to be set for Power Politics or a New Order.

Professor Lauterpacht's article on the punishment of war crimes ranges over a wide field of topics, which include the plea of superior orders and extradition apart from the substantive and procedural law of war crimes proper. The discussion on the relation between municipal criminal law and the international law of war crime is particularly valuable. Dr. Colombos examines the past achievements and future prospects of unification in the sphere of maritime international law. This technical branch of the law should lend itself more readily than others to concerted action. Mr. Mervyn Jones contributes a study on international agreements other than inter-state treaties. From the British point of view these inter-governmental or inter-departmental arrangements raise problems of a technical character only, while in the United States the appearance of the 'Executive Agreement' has raised a grave constitutional issue which affects the claim of the Senate to the exclusive control of the treaty making power of the Executive (see, e.g., *McDougal and Lans* in (1945) 54 Yale L. J., 187, 534). In a learned note implied recognition is examined from the standpoint that recognition is a legal duty. As a result, implied recognition is restricted to three situations: first, 'the conclusion of a bilateral treaty which regulates comprehensively the relations between the two States;' second, 'the formal initiation of diplomatic relations and, probably, the issue of a consular exequatur,' and, third, 'in the case of belligerency, a proclamation of neutrality or some such unequivocal act.'

Further notes on current problems, detailed critical surveys of the decisions of English Courts on public and private international law and on Trading with the Enemy during the years 1939—1942, and book reviews make up the remainder of the volume which maintains the high standards set by its predecessors.

K. L.

International Law. By GEORG SCHWARZENBERGER, Ph.D., Dr. Jur.
Vol. 1. *International Law as Applied by International Courts and Tribunals.* London: Stevens & Sons, Ltd. 1945. xlv and 645 pp.
(£3 net.)

This is the first volume of what promises to be a major and most useful addition to the instruments of study of international law. For this volume is to be followed, in due course, by one on international law as applied by British state practice and another as administered by English Courts and other Courts within the British

Commonwealth and Empire. The present volume presents a picture of international law as applied by international Courts and tribunals. The order adopted by the author is, it is believed, a proper one, for international law as applied by the British Government and British Courts can be best appreciated by reference to its impartial interpretation by international tribunals.

The idea of giving a total picture of international law in terms of decisions of international courts and commissions was first conceived by Mr. Jackson H. Ralston, an American lawyer of considerable experience in the field of international arbitration. He published in 1926 a work entitled *The Law and Procedure of International Tribunals*, and he supplemented it by another volume which appeared in 1936. It is possible that Mr. Ralston may feel slightly aggrieved by the fact that Dr. Schwarzenberger merely refers to him in passing in an obscure footnote. But the author of the present volume may justly claim that his work is a considerable improvement upon Mr. Ralston's volumes. The classification is more lucid and scientific. The range of materials used is wider. Above all, Dr. Schwarzenberger is not satisfied with presenting a classified digest of decisions. The volume abounds in critical and explanatory comment which makes it easier to follow apparently disconnected decisions. The author does not present an exhaustive picture of the activity of international tribunals, but this probably was not his intention. His object, in which he has succeeded admirably, is to draw the attention of the general reader to the wide range of subjects covered by decisions of international tribunals. Any layman—or uninformed lawyer—who thinks of international law as a pretentious abstraction or merely a product of the literary activity of 'publicists' stands to learn a great deal by a study of this volume. The student of international law will find in it a useful supplement to the text-books and so will the practitioner. It is not Dr. Schwarzenberger's fault that the volume does not cover every subject of international law. The work of international Courts and tribunals has been, so far, spasmodic and, on the whole, infrequent. This state of affairs will continue so long as governments and the peoples which they represent refuse to subscribe effectively to the principle of obligatory jurisdiction of international Courts.

H. L.

Legal Aid. By ROBERT EGERTON, M.A., LL.B., Solicitor of the Supreme Court. With a Preface by Professor A. L. GOODHART. London: Kegan Paul, Trench, Trubner & Co., Ltd. 1945. xii and 160 pp. (10s. 6d. net.)

Report of the Committee on Legal Aid and Legal Advice in England and Wales. Cmd. 6641. London: H.M. Stationery Office. 1945. 48 pp. (9d. net.)

Mr. Egerton has written a very valuable book. He is primarily concerned with legal aid in England and Wales, but he devotes one chapter to legal aid in other countries, and in an appendix he gives a comparative summary of the position in nearly all countries. The first part of the book is historical and descriptive, and the second part critical and concerned with remedies. It is a subject on which Mr. Egerton is well qualified to write, because for some time he has been actively engaged in the work of the legal aid centre at Cambridge House, and he has a wealth of practical experience to add to a scholarly study of the subject. It is a pity that the book has no index.

The somewhat lazy reader will start off with the idea from Professor Goodhart's Preface that the subject is legal aid for 'the poor.' Now it is quite clear from the material that Mr. Egerton gives that the problem is not just one of legal advice and assistance for the poor, and that there is a large class of better paid wage-earners and salaried people who cannot afford legal assistance. Of course Mr. Egerton knows

this, and says it, but it wants emphasis. The size of income out of which a man ought to be able to pay for any reasonable need for legal service is far higher than any poverty line: it goes up to gross incomes of over £500, although such persons may need partial assistance, whereas poorer people need much more help. The problem is how to secure a legal service for the bulk of the population.

One of the merits of Mr. Egerton's book is that he explains why the problem is difficult and why there is no simple solution. Those who think that all that is needed is to set up a state service, or make it a local government service, or subsidise the voluntary agencies, must read the book, for there is no short cut.

In May, 1944, the Lord Chancellor appointed a Committee to enquire into facilities for legal advice and legal assistance and to make recommendations. That Committee, under the chairmanship of Lord Rushcliffe, presented a Report published in May, 1945. The Report appeared before Mr. Egerton's book was published, but the Report does not supersede the book as a study in the subject; they ought to be read together.

The Report sets out the existing system or lack of system. The Committee naturally had access to more information and later statistics than Mr. Egerton, and one should turn to the Report for the best account of the developments that have taken place during the war. The war showed three things; that the civilian population must be able to get advice, that the personal affairs of those in the Forces required a legal service, and that the voluntary services of solicitors cannot meet the need. Unfortunately the Report is brief and does not deal sufficiently with some allegations about the existing system. Thus it is said by many people that some local Law Societies in working the Poor Persons Procedure have tended to act as censors of morals and have refused certificates on grounds not really relevant to the question they should decide. Mr. Egerton, in Chapter VII, gives some evidence about this, but an official committee could have made a thorough investigation. A Departmental Committee has an opportunity to get beneath the surface of things and give an authoritative account of the actual working of a system so that its report is a social document of the highest importance. If the Rushcliffe Report contained as careful an examination and as much reference to the evidence as, say, the Report of the Committee on Imprisonment in Default of Payment of Fines (Cmd. 4649), it would be far better and far more effective. This deficiency in the Rushcliffe Report is particularly unfortunate because the past conduct of Poor Persons Procedure has a direct bearing upon the proposals in the Report.

The Report recommends that England and Wales should be divided into ten areas. For each area there would be an Area Committee of solicitors appointed by the Law Society, with representatives of the bar if the bar desires. The Area Committee would appoint Local Committees, and these Local Committees (subject to appeal to the Area Committee) would grant certificates for legal aid in all civil courts. Legal aid would be free to the poorer people and be available according to need for those with incomes up to £420 after paying income tax and certain other allowances. There would also be a limit for capital possessed by applicants. The work of conducting cases for assisted persons would be done by solicitors and barristers who put their names on panels, the client choosing his solicitor from those available. Solicitors would receive disbursements in full and 85 per cent. of solicitor and client profit costs. This is on the basis that 70 per cent. of 'profit costs' go in overhead expenses, so that solicitors would get 50 per cent. of true profit. Counsel would get 85 per cent. of the fee normally allowed on taxation. It would also be the duty of the Area Committee to provide legal advice centres, staffed where possible by full time salaried solicitors and elsewhere by solicitors paid per session. There would be a flat charge of 2s. 6d. for advice, but the fee could be waived or advice could be refused if the applicant seemed able to pay for advice in the usual way. Area and Local Committees would have paid secretaries and the members would be paid their expenses. The cost of running all this would be paid by the State.

For the criminal courts, the existing system of the Poor Prisoners' Defence Act would be kept with modifications. Certificates would be granted by two magistrates, or a recorder, chairman of sessions or judge, and certificates for legal aid would cover both parties to civil matters in these courts. The remuneration of solicitors and counsel would be improved, and the cost would be borne by the State and not as at present by the local authority.

In assessing the virtues of this plan Mr. Egerton's book is a great help. Two examples must suffice. Mr. Egerton stresses the need for a unified system. How would the recommendations of the Report work in a case of domestic trouble? The woman wants advice and goes to the advice centre and gets advice for 2s. 6d. or perhaps no charge. If legal proceedings are needed, the advice centre will have to send her on to either the Local Committee or the magistrates according to whether the proceedings are to be in the High Court or magistrates' court. Now the Local Committee may not agree with the solicitor who gave advice, and may reject an application for legal aid in the High Court on the ground that the matter should be dealt with by the magistrates; the magistrates may think it a matter for the High Court. It is bad administration to have two bodies each able to assert that the other is responsible for taking action, and the common result is at the best a waste of time and temper. The other example: are we sure that the Law Society can be safely trusted to put the public welfare before the interests of the legal profession? The Law Society is to be responsible to the Lord Chancellor, who is to have an advisory committee. Nobody doubts the integrity of the Law Society, but we cannot simply dismiss the chance of the working of the scheme being too much influenced by professional interest. Mr. Egerton argues in favour of a controlling body that would include representatives of the social service organisations.

Whatever valid criticism there may be of the detailed recommendations in the Report, there can be no doubt about its significance. For the first time an official committee has recommended that the State should take responsibility for ensuring that all persons in the community should be able, as of right and not by way of charity, to obtain such legal service as may be necessary. It would be an immense change, and it would have profound effects upon the legal profession. A substantial amount of private practice would come from the affairs of assisted persons. To be competent on the matters on which advice and action would often be required, such as the social services, many solicitors would have to study subjects that are generally regarded as not being lawyers' law. The legal profession would have to become less individualistic and yet maintain the tradition of the relationship between lawyer and client. If lawyers can make a proper job of working this new scheme when it is introduced, they will make a contribution to justice as great as any of the achievements of the past.

R. M. J.

An International Bill of the Rights of Man. By H. LAUTERPACHT, M.A., LL.D., Whewell Professor of International Law in the University of Cambridge. New York: Columbia University Press. London: Humphrey Milford (Oxford University Press). 1945. x and 230 pp. (\$3.00.)

The Second World War came about because the greater part of mankind took up arms against an enemy not only of all decent government but of the elementary rights of human beings. This book by Professor Lauterpacht is a plea that these rights should be enshrined 'as part of the fundamental constitution of International Society and of their own States,' that is to say, of the States of the United Nations of the World. This means that international law should formally recognize that its purpose is ultimately the same as that of all law—the protection and furtherance of human welfare.

The book is divided into three parts. The first deals with the general conception

of the rights of the individual as shown in the Law of Nature and of Nations. Here the author explains the continuous tradition of legal and political thinking which lies behind the doctrine of the rights of man. He discusses the manner in which international law has received that doctrine and adapted it to the needs of international society, resulting in the formulation of specific rules, such as those recognizing humanitarian intervention and the minimum standards of civilization in relation to the treatment of aliens. Professor Lauterpacht concludes this part of his book with a chapter on 'Natural Rights in British Constitutional Law and Political Theory,' which has a direct bearing on the attitude likely to be adopted by this country on the whole conception of an International Bill of Rights. The whole of this part of the book is so full of ideas, and so fresh in its treatment of the subject, that we are glad to learn that it is the author's hope to publish it separately in an extended form as soon as circumstances permit.

Part II consists of the text of Professor Lauterpacht's Draft Bill of Rights. The clauses are divided under three headings: (1) Personal liberties of the individual; (2) Political, economic, and cultural liberties; (3) Enforcement and Sanctions. Each clause is subjected by the author to searching criticism, and followed by careful exposition. Every difficulty likely to arise is anticipated, every reasonable criticism given its full value; and to each difficulty and criticism Professor Lauterpacht provides a reasoned reply.

Part III deals with the Enforcement of the Bill. The author has very rightly supposed that this is the aspect of the project most likely to prove troublesome, and it is certainly the point which will attract most attention from his English and American readers. No reader can fail to be impressed by the author's highly pragmatic and realistic discussion of this problem. He rejects the method of enforcement by international judicial review, emphasizing the necessity of a permanent international authority charged with general powers of supervision, of investigation of complaints, &c. This authority would be a High Commission appointed by the Council of the United Nations. It could make annual reports to the Council, and draw attention to infractions of the Bill which called for action. The actual enforcement of the Bill by way of sanctions could be entrusted to the Council itself.

A book which combines so effectively legal theory with political knowledge, and is infused throughout with a passionate idealism uncommon in legal writings, cannot be justly appreciated or summarized in a review of this length. This is not only another weighty addition to the technical literature of international law, which demands the attention of all students of the position of the individual under its rules: it is a work in which the author treats of hopes and fundamental beliefs, which have commanded respect from all high-minded men in all ages, and which will endure so long as man remains conscious of his immortal destiny. As such, it deserves to be read, not with a view to the practicability of this or that proposal, but with a large sympathy, having in mind the plane of jurisprudence on which it is written, and with a sober understanding of the sombre dangers which confront our civilization.

J. M. J.

The Army and the Law. By Professor GARRARD GLENN. Second Edition (revised and enlarged) by A. ARTHUR SCHILLER. New York: Columbia University Press. London: Humphrey Milford (Oxford University Press). 1943. ix and 187 pp., and (Table of Cases and Index) 15 pp. (18s. 6d.)

The purpose of this book is to deal with the army 'in its relation to the common law which governs the general public, and with the soldier . . . in so far as his activities are, in point of law, of interest to non-military persons' (p. v). It contains

much of interest to the English lawyer who will find his English authorities re-stated in a new setting which does much to clarify the problems with which he first became acquainted when reading parts of Dicey's *Law of the Constitution*. The book has, however, a wider interest because the United States of America (Visiting Forces) Act, 1942, exempts from the jurisdiction of our municipal courts all members of the armed forces of the United States, with the result that all complaints, whether of a civil or a criminal nature, come up for decision by the American authorities. An outline, therefore, of the principles on which those authorities and their tribunals deal with such complaints is of obvious importance.

A few suggestions as to the English matter might perhaps be considered by the editor. On p. 107, a reference to the War Zone Courts Act, 1940, would support and illustrate the views there expressed. The discussion on p. 171 of the obligation of the government to pay compensation for property seized in time of war must be incomplete without a mention of the Compensation (Defence) Act, 1939. On p. 88, the not uncommon confusion between Lord Mansfield and Sir James Mansfield seems to take place. A table of statutes would make the information in the book more readily available for reference and enhance the value—already high—of the book.

D. W. L.

The Administrative Theories of Hamilton and Jefferson. By LYNTON K. CALDWELL. Chicago: University of Chicago Press. London: Cambridge University Press. 1944. ix and 241 pp., and (index) 2 pp.

This is a readable book which makes one wonder how the first cabinet of George Washington managed to contain for three years two such divergent persons as Hamilton and Jefferson. The author, however, nowhere sets out what he means by 'administration,' and without this guidance one is left with the feeling that even if Hamilton and Jefferson did have explicit ideas about something called administration, those ideas were inextricably mixed up with their general political beliefs on which much has already been written. In the concluding chapter the author himself seems to admit this, for he says that 'the fundamental difference between the administrative ideas of Hamilton and Jefferson appears to be in their attitude towards the control of political power' (p. 230), and later (p. 238) he states: 'Certainly it is true that Jefferson's administrative thought revolved about a focus quite distinct from that which lay at the center of Hamilton's thinking. Here political theory inevitably intrudes, for the *nation* was the hub upon which Hamilton's thought turned, whereas with Jefferson the *individual* was centermost.'

D. W. L.

Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664—1776). By Professor JULIUS GOEBEL and T. RAYMOND NAUGHTON. New York: The Commonwealth Fund. London: Humphrey Milford (Oxford University Press). 1944. xxxix and 794 pp., and (Index of Cases and General Index) 73 pp. (28s.)

The immense labour involved in the preparation of this book must have seemed worth while to Professor Goebel if only because it enabled him to write the introduction in which he joins issue with many eminent American lawyers, notably Professor Roscoe Pound. Basing himself upon a study of the legal records of the State of New York for over a century, Professor Goebel attacks the view that there was no formative era of American law prior to the Revolution, but only rough 'frontier' justice. In his opinion, the reception of English law and procedure started with

the composition of the State from the Dutch in 1664, and though for twenty years the law system was principally that of English local and manorial courts, after 1683 it was the common law of the superior English Courts which was most freely drawn on. By the time of the Revolution, therefore, the lawyers of New York had had a century's experience of adapting the English common law to meet the needs of their State, and the law administered by the New York Courts after 1776 was not very different from that administered by those Courts in the earlier part of the eighteenth century. The gulf between Professor Goebel and Professor Pound can be realised if one recalls the latter's generalisation (*The Spirit of the Common Law*, p. 114) that 'Our political organization and the great body of our American common law are the work of the last quarter of the eighteenth century and the first half of the nineteenth century.' Whether detailed studies of the remaining twelve States which originally formed the Union would bear out Goebel's view or that of Pound is an interesting question which one hopes will be answered in due course. Where the experts differ so widely, it seems wiser to withhold judgment. But the interest of the book for English lawyers does not depend on whether Professor Goebel is right or wrong, for the detail it contains illustrates the relationship between the Mother Country and her American colonies in the eighteenth century, with sidelights on the law applicable to conquered colonies and the extent to which appeals to the Privy Council were taken. It also brings out vividly the difficulties arising from the eighteenth century policy of denying to Englishmen abroad the political rights which had been won in the previous century for Englishmen at home.

D. W. L.

League of Nations and National Minorities: An Experiment. By P. DE AZCÁRATE. Washington: Carnegie Endowment for International Peace. 1945. 216 pp. (\$2.00.)

This is one of the more valuable presentations of the working of the system of protection of minorities under the League of Nations. It is written by the former Director of the Minorities Section of the League, and it would be difficult to find anywhere a more balanced or authoritative exposition of the subject. But although the narrative is brought up to the beginning of the Second World War, in substance, i.e., so far as the actual development of the system is concerned, the book adds little to Mr. Macartney's standard treatise on the subject published in 1934. The reason for this is that, in the five years which followed, the reality of the system of protection of minorities became a function of the political authority of the League as such, and that, as the result, the development of the system was brought to a standstill. M. Azcárate attaches so much importance to the experience of these years of frustration that he is inclined to consider the stultification of the system as being inherent in it from the very inception. He expresses the view that in the matter of protection of minorities the task of the League was largely 'to explore new territories' (p. 128). This is not the impression which one gains in reading the solemn declarations of the Allied and Associated Powers at the time when they imposed the Minorities Treaties upon the successor States. The system established by the Treaties was there described as an essential condition of international peace. But M. Azcárate thinks so little of the actual degree of obligation implied in the Minorities Treaties that he regards the undoubtedly most useful visits of the Director of the Minorities Section to the countries concerned—visits which took place only on the formal invitation of these countries—as being 'the first attacks made up to the present on the sacrosanct principle of national sovereignty' (*ibid.*). In general, he seems prepared to justify the methods adopted by the Council on the ground that, in the absence of proper means of enforcement, it would 'have been folly to allow the League procedure for protection of minorities to clog the working of the new

international machinery instead of acting as lubricant' (p. 134). There may be some difficulty in acquiescing in the notion that the effective fulfilment of one of its essential purposes is likely to clog the working of the international organization. But it is a view propounded by a progressive writer and an administrator of experience and it must therefore be carefully considered in connection with any future schemes for the protection of the rights of minorities and of the individual in general.

H. L.

The International Secretariat: A Great Experiment in International Administration. By EGON F. RANSHOFEN-WERTHEIMER. Washington: Carnegie Endowment for International Peace. 1945. xxvii and 500 pp. (\$4.50.)

The discussion whether the League of Nations was a 'failure' or not, or whether its failure was due to its inherent imperfections or to the default of its members is likely to last for some time. But there is general agreement that the working of its institutions has been the source of useful experience from which any future international organizations of states is likely to derive much benefit. To no aspect of the work of the League does this apply more cogently than to the activity of its Secretariat. Dr. Ranshofen-Wertheimer has now supplied what is bound to remain the standard work on this central and essential branch of international administration.

The book commences with a general discussion of the functions of the Secretariat, of the Secretary-General and of his principal assistants in terms of international leadership. It then gives a description of the machinery of the Secretariat, of its general services (such as the political and legal sections, the treasury and the library), of the specialized services of the League as embodied in the various sections and of the internal administrative services. This part includes an interesting description of the external relations of the Secretariat, of the *liaison* activities of its officials, of its branch offices and its permanent delegates. The question of the supranational allegiance of the staff is discussed with a happy mixture of restraint and fervour. A large part of the treatise is devoted to what is described the international civil service code. This includes the contractual status of the officials and its safeguards throughout the operation of the Administrative Tribunal and otherwise, the diplomatic and other privileges of the staff, its classification, the duration and termination of service, and the recruitment of the personnel. The book ends with a general evaluation of the rôle of the Secretariat and consideration of the location of the headquarters of the international organization.

This summary illustrates the wide scope of the volume. It cannot convey an adequate impression of the maturity and the competence of the treatment of the vast theme. The author of the treatise, and the Carnegie Endowment for International Peace who have made possible its publication, have performed a valuable service in the cause of the scientific study of international administration.

H. L.

The Law of Contracts. By G. C. CHESHIRE, D.C.L., Vinerian Professor of English Law, Oxford, and C. H. S. FIFOOT, M.A., All Souls Reader in English Law, Oxford. London: Butterworth & Co. (Publishers), Ltd. 1945. xlviii, 435 and 22 pp. (35s.)

In an attractive preface, the learned authors give their reasons for the production of a book 'upon a subject on which the public are already in possession of many others.' The reasons are well-founded and we congratulate the authors on an important and valuable addition to legal literature. It fully maintains the standard achieved by Professor Cheshire and Mr. Fifoot in earlier separate publications of theirs

with which all teachers of law are acquainted. The easy style in which the book is written, its neatness of arrangement and clarity of exposition make it highly readable, especially for students; and its careful examination of the authorities and its skill in handling doubtful points make it essential that any one interested in the law of contract, whether as a teacher or researcher, should consult it. A typical instance of the good results achieved is Part IV, Chap. 1, on the difficult subject of Mistake; the authors' criticisms of particular decisions in this rather tangled branch of the law are in general convincing. A slip on p. 145 is the citation of *Foster v. Mackinnon* for some other case, the facts of which are given in the text. A few other points for consideration in the next edition may be mentioned. In the Historical Introduction, more emphasis might be laid on the part played by local courts, in early times, in enforcing what we now call contracts. They were not always fettered by the somewhat narrow boundaries of debt, detinue and covenant, the remedies in the King's Courts. At pp. 19—20, the treatment of contracts under seal is rather brusque. Something might have been said here or elsewhere of the circumstances in which the lack of consideration in such contracts is relevant in the application of equitable remedies. *Wiles v. Maddison* (p. 22) is of little assistance on the question whether articles exposed in a shop-window are 'offers,' for the decision was on the interpretation of a statutory order; moreover, in this connexion, reference might be made not merely to the report of *Timothy v. Simpson* in the Court below, but also to the later report of it before the Court of Exchequer (1835) 1 Cr. M. & R. 757, 760, where, as the Court held the plaintiff to be a trespasser, it must be inferred that it also held that there was no 'offer.' Members of the Law Revision Committee may be amused at the allegation (pp. 72—73) that their deliberations were surrounded by an 'aura of academic propriety' which made them reach wrong conclusions. We wonder whether the learned authors have looked at the list of the members of that committee. At any rate, having read the authors' criticisms of the committee's recommendations, our impression is that the authors have a much stronger claim to the aura. At p. 138, the analogy of frustration to 'common mistake' seems artificial and there is a risk of its misleading a student who finds (at p. 367) that the doctrine of frustration is based on 'what the Courts presume to be the common intention of the parties.' There does not appear any connexion between this and 'common mistake' as defined at p. 138. At p. 221, it might be worth while to qualify the general rule as to the illegality of contracts to commit a tort by noting that a contract between the parties may negative the existence of what would otherwise be a tort; e.g., an agreement between X and Y which permits Y to do something on Y's land that, apart from the agreement, would constitute a private nuisance against X. In the next edition, Coke, Holt and Hale had better be deprived of the posthumous peerages conferred upon them by the authors.

The suggestions we have made do not in the least modify our opinion of the general excellence of the book and we regret that it came into our hands too late for incorporating references to it in the forthcoming twelfth edition of Pollock on Contract.

P. H. W.

Salmond's Law of Torts. Tenth Edition. By W. T. S. STALLYBRASS, D.C.L., Principal of Brasenose College, Oxford. London: Sweet & Maxwell, Ltd. 1945. 1 and 678 pp. (35s.)

The learned editor had a good deal of leeway to make up in order to bring Salmond's book up to date, for the last edition was in 1936 and he had to take account of some important legislation and of a great many decisions. Although 489 new cases have been added and only 167 omitted, space has been saved in several instances by excluding matter in the earlier editions and giving bare references to them. This causes little extra work to those of us who possess the earlier editions, but many readers

have not got them and not every library includes them. The new edition is as characteristic of Dr. Stallybrass's profound learning and clarity of exposition as were the previous three editions for which he was responsible.

On the much-debated question of the extent to which 'liability without fault' is a basis of liability in tort, it is said (at p. 20) that 'the twentieth century seems likely to be characterised by the backward swing of the pendulum,' i.e., by a tendency to hold the defendant liable where he is not morally to blame. We should hesitate to say that the Courts show any general trend towards one principle or the other. The examples of liability without fault which are given by Dr. Stallybrass may be set off by instances of no liability without fault under each particular head mentioned. We have not space to go into details, but the Rule in *Rylands v. Fletcher* is qualified by decisions like those in *Tilley v. Stevenson* [1939] 4 All E. R. 207; *Thomas & Evans, Ltd. v. Mid-Rhondda, &c.* [1941] 1 K. B. 381, and *Collingwood's Case* [1936] 3 All E. R. 200, as well as other 20th century decisions. Again *Woodward's Case* [1945] K. B. 174, taken in conjunction with *dicta* in earlier decisions, puts qualifications on liability for the default of independent contractors in connexion with dangerous structures. Our impression is that where the Courts are presented with the problem of deciding whether moral innocence is a defence, they take each case on its merits (of course having regard to previous authorities) without accepting as a general principle either 'no liability without fault' or 'moral innocence is no defence.'

On the doctrine of common employment, and in connexion with p. 99, note (h), we venture to call the editor's attention to *Hutchinson's Case* (1850) 5 Ex. 343, 352; the definition of common employment given there was approved by Lord Cranworth L.C. in the *Bartonshill Case* (1856) 3 Macq. 266, 277, and by Lord Alverstone C.J. in *Tozeland's Case* [1906] 1 K. B. 538, 543. As to the extent of a principal's liability for the torts of his agent, it is said (at p. 81, note (l)) that 'mere passive acquiescence [of the principal] is not authority' and for this a *dictum* of Talbot J. in *Barber v. Pigden* [1937] 1 K. B. 664, 665, is cited; but in the Court of Appeal the judgments of Greer and Scott L.JJ. contain no reference to this *dictum*, and we think it would be better to say that the authority of the principal must be express or implied; this view is supported in Bowstead, Agency (10th ed.), 205—218. On the other hand we entirely concur in the editor's excision of a paragraph of Salmond's in earlier editions, which understated the extent of the principal's liability.

In the account given of *Ward v. Weeks* (p. 150), a reference might have been made to two of the three exceptions postulated by Lopes L.J. in *Speight v. Gosnay* (1891) 60 L. J. Q. B. at p. 232; other authorities for these exceptions are cited in Gatley, *Libel and Slander* (3rd ed.), 118—120. Doubts are expressed about my view (*Textbook of Tort* (2nd ed.), ch. XXIII) that there is an independent tort 'Dangerous operations.' My reply to this is embodied in the 3rd edition of the Text-book (now in course of publication), p. 572; and, with respect to Professor Goodhart's criticism, cited by Dr. Stallybrass, p. 117, note (b), my answer is that it is quite possible for the Courts to create new torts unconsciously.

In view of Dr. Stallybrass's admission that 'strict liability,' is now recognised as a more appropriate term in English law than 'absolute liability' (p. 513; see, too, pp. 23—25), it is rather confusing, at any rate for the student, to find the term 'absolute' retained in several passages (e.g., pp. 107, 544); the confusion is increased because, while the heading in the index is 'Strict liability,' several of the references in the text are to 'Absolute liability.'

It is scarcely necessary to add that the suggestions that we have put forward go no farther than presenting other arguable points of view and in no way derogate from the general excellence of the work. Indeed, we take this opportunity of expressing our personal indebtedness to Dr. Stallybrass for the assistance that we have derived from all his editions of Salmond's book. It is a marked tribute to his ability that he has adhered to the author's original aim of exploring the Law of Tort widely for the practitioner without going too far afield for the student.

P. H. W.

Annual Digest and Reports of Public International Law: Years 1941—1942.
 Edited by H. LAUTERPACHT, M.A., LL.D., Whewell Professor of
 International Law, Cambridge. London: Butterworth & Co.
 (Publishers), Ltd. 1945. xxxvi and 651 pp. (55s. net.)

In his preface to this volume the learned editor points out that it consists predominantly of reported cases rather than digests of cases and that this represents a change from the earlier volumes in the series. It is a development that all readers of the series will welcome, for, valuable as a digest of cases is, it is only rarely that any lawyer can use that as a substitute for consulting the reports which it epitomizes. More than half the book is devoted to cases arising out of the Second World War and in that connexion it is not limited to matters directly arising out of War or neutrality. Thus, *Murray v. Parkes* [1942] 2 K. B. 123, relating to the obligation of a citizen of Eire to serve in the British forces, is included. Topics that naturally bulk largely are the meaning of 'War,' the acquisition of enemy status and the effect of war on contracts. Two American decisions exhibit an apparent conflict of judicial opinion between the Supreme Courts of Massachusetts and South Carolina on the question of when war began between the United States and Japan (pp. 431 and 435, note). A case reported under 'Punishment of War Crimes' (p. 564) is a decision of the Supreme Court of the U.S., *Ex parte Quirin* (1942) 317 U. S. 1, which throws a high light on the thoroughness of Nazi technique in the training and employment of *saboteurs* in war. Seven Germans, one of whom claimed American citizenship, were detected as *saboteurs* and put upon their trial by a military tribunal. They appealed to the Supreme Court for Writs of *habeas corpus* on the ground that their trial ought to be by a civil court. The application was unsuccessful.

Among the cases relating to the International Law of peace, over fifty pages are concerned with diplomatic and consular intercourse and privileges. Several cases on extradition are also given, and one of them, *In re Arevalo* (p. 329), leaves one rather puzzled as to the consistency of the decision of the Supreme Court of Colombia with the obligations of Colombia under its treaty of extradition with Venezuela.

We congratulate Professor Lauterpacht and his collaborators on maintaining the standard of the series in face of difficulties which the war has made only too obvious. One effect of the war was the suspension of the Permanent Court of International Justice and of other international Courts, and this necessarily reduced to a minimum in this volume the reports of the decisions of such tribunals; but the fact that the majority of the decisions included were rendered by national Courts in no way lessens the value of the book to international lawyers.

P. H. W.

Private International Law. By MARTIN WOLFF. Oxford University Press. 1945. xxxiv and 637 pp. (35s. net.)

Private International Law is a branch of English Law which has grown rapidly in importance of late, and is likely to become even more important in the near future. Its literature has not, however, expanded to a corresponding extent, and we should, for this reason alone be ready to welcome a book on the subject by a writer of such great distinction as Dr. Martin Wolff has proved himself to be. But the matter does not rest there because the volume now under review possesses certain special features which greatly enhance its value as a contribution to the literature of our law. Private International Law has tended, in the past, to be a 'one book' subject. For many years Story's great work on the *Conflict of Laws* held pride of place from which it was only ousted at the end of the 19th century by the rival treatises of Foote and Dicey. The competition between these two works terminated in the acquisition by Dicey's book of a position of pre-eminence which has rarely been

equalled in the history of our law. Westlake's *Private International Law*, perhaps the most scholarly and certainly the most erudite of all English works on this subject, was too difficult for the student and too abstract for the practitioner. The fact that Dicey's treatise has attained this predominant position is proof, if any be needed, of its great and undoubted merits, but this achievement should not lead us to shut our eyes to the shortcomings of the book which are revealed when the laying down of new principles is concerned. Dicey himself never claimed that his work was more than a 'digest or systematic arrangement' of rules derived from the decisions of the English Courts. The very structure of the book, which is based on the formulation of rules shows that Dicey's main object was to give clear expression to principles which were already in existence, and that he did not seek for new principles with which to make good the many gaps which exist in this branch of our law. Subsequent editors have, it is true, endeavoured to make this deficiency good, but the policy adopted of preserving Dicey's rules, has resulted in the relegation of much important material to the obscurity of footnotes and appendices. As a manual for practitioners and judges Dicey's book still holds an unchallenged position, but there is ample room for other works and, in particular, for one such as Dr. Wolff's, which is avowedly designed to deal with the situation which arises when there are gaps to be filled in our system of the rules of conflict. The learned author has drawn on his unique knowledge of continental law for this purpose, and herein lies the most striking and valuable feature of his book. The problems which are created by a clash of competing legal systems are apt to assume the same form everywhere and, in such circumstances, it would appear to be natural to resort to foreign sources for elucidation as was, indeed, the practice of our judges until the latter half of the 19th century. It is not possible to give an exhaustive list of the problems which lend themselves to solution in this way but an example of the value of the assistance which can be derived from foreign experience is to be found in the case of conflicts concerning capacity to enter into contracts. English law has treated this question in such a vague manner that many important aspects of it still remain in a state of uncertainty. Dr. Wolff's discussion of the problems involved in this particular matter is altogether admirable, and there is no other work in which they are considered so carefully and so adequately. But it must not be thought that the value of his book is limited to cases which raise novel points of law. His treatment, for instance, of the 'proper law of the contract' is at least as good and, in many respects, much better than that to be found in any other text-book published in England. It will appeal both to academic lawyers and to practitioners. Attention may also be directed to the excellent survey of the history of Private International Law which supplies a need that has been felt for some time by teachers and students.

The main respect in which this book is open to criticism lies in the Author's discussion of some of the English cases. Taken as a whole, his handling of our case law is admirable and his comments on individual decisions are acute and well reasoned. But, on occasion, he goes astray as regards the weight to be attributed to a particular case. He suggests, for instance, that the House of Lords might at some future date, reconsider its decision in *Shaw v. Gould* (1868) L. R. 3 H. L. 55. This is a view of the operation of the doctrine which one might wish to see established, but is unfortunately incorrect. The effect of individual decisions is also over-emphasised at times (e.g., *Mitford v. Mitford* [1913] P. 130), and an authority which they do not possess is occasionally attributed to doubtful cases (e.g., *Ogden v. Ogden* [1908] P. 46). But such lapses are rare and could be remedied in subsequent editions without any substantial alteration of the text. There are also certain inaccuracies of a minor character, e.g., the statement at p. 57 that the Brussels Convention of 1925 relating to the immunity of state ships is nowhere in force. A curious misprint occurs in note (1) on p. 45. I hope that an English lawyer will not be regarded as hypercritical if he is guilty of a little grumbling as regards the arrangement of the book into numbered sections with corresponding entries in the index. This is unfamiliar and some-

what irksome to us, though it is the established practice on the Continent and possesses certain advantages.

These are, however, not matters of any moment and they do not, in any way detract from the undoubted value of this book. The English rules of the conflict of laws and jurisdiction are, of course, part of our Common Law, but they may be called on to function in an ambient of foreign law. A book which explains the nature and operation of the Private International Law of other countries to English lawyers has been a need for some time. Dr. Wolff is to be congratulated on an achievement which will be of real value and assistance to those whose concern in Private International Law is more than a mere matter of passing an examination or of looking up an occasional point of law. His book will not only occupy a place in the literature of our law which has hitherto been vacant but will also provide a stimulus to the growth and development of our existing law by the introduction of a stream of fresh thought into a subject which is still in the stages of adolescent growth.

H. C. G.

The Roman Law of Sale: Introduction and Select Texts. By F. DE ZULUETA, D.C.L., F.B.A., Regius Professor of Civil Law in the University of Oxford. Oxford: At the Clarendon Press. 1945. xii and 265 pp. (21s. net.)

A large part of the Roman commercial law is contained in the titles of the Digest dealing with Purchase and Sale, and half a century ago the late Dr. Moyle in his work on Contract of Sale in the Civil Law and Mr. Mackintosh in his translation and commentary on the titles XVIII.I and XIX.I of the Digest had supplied students with much of the material necessary for an investigation of the survival and influence of the Roman rules in modern legal systems. English law approaches the subject from the point of view of title to property, and that is how the subject of Sale is dealt with in Blackstone's Commentaries, but Roman Law regards it throughout as a contract and as a matter falling wholly within the scope of obligation. From this arise differences between the rules of English law and those of systems governed by the Roman rules which require careful appreciation by all students of comparative law and legislation. Professor de Zulueta has not confined himself to the titles of the Digest already translated, but has usefully added translations of other parts of the *Corpus Juris* bearing on his theme. He has written a scholarly and exhaustive commentary which will undoubtedly from henceforth be the starting point of the studies of English students of the comparative law of Sale. The inclusion of the texts of the English Sale of Goods Act, the Uniform Sales Act and Uniform Conditional Sales Law of the United States of America, and the appropriate articles of the French Civil Code with a translation, give the work a completeness which will be of great value in practice. Where, as in some British Dominions, the Roman rules are still in force, this comparative study by legislators may avoid the danger of such casual legislation as the Act applying (*inter alia*) the English law of *stoppage in transitu* to Cape Colony, which was a cause of considerable difficulty in the Courts.

D. T. O.

Some Reflections on Jurisprudence. By W. W. BUCKLAND, LL.D., F.B.A., Emeritus Professor of Civil Law in the University of Cambridge. Cambridge: At the University Press. 1945. 118 pp. (6s. net.)

It is a matter of profound sorrow to all of us who were associated during many years with the gifted author of this small volume that, since it was published, he has passed away and is no longer with us to supply that mature wisdom and generous aid in legal study which was always so freely at the disposal of those who needed it.

The book is packed throughout with useful discussions of essential legal concepts and acute criticisms of recent theories of law. This criticism is in the main destructive; but the writer remains firm in refusing the description of positive law to any rules and principles other than those backed by the sanction of public force, acting under the authority of the Courts of a 'State'; whether by 'State' a sovereign of the Austinian type is indicated may be a question, but this is evidently left at large.

A perusal of the heads of the ten chapters into which the subject-matters are divided indicate that the range covered is a very wide one. As the author says, 'Jurisprudence is a most hospitable word. It can be understood to include not only the analysis of legal concepts but also all those topics which are discussed under the rubric Philosophy of Law.'

D. T. O

A Text-book of the English Conflict of Laws : Private International Law.

By CLIVE M. SCHMITTHOFF, LL.M.(London), LL.D.(Berl). London: Pitman. 1945. xlvii and 455 pp. (35s. net.)

Students and practitioners who wish to obtain accurate and comprehensive information, unencumbered by doctrinal disputes and theoretical considerations about the present state of Private International Law in England, will find Dr. Schmitthoff's book a reliable guide to the subject. The author makes full use of the decisions of English Courts, gives instructive illustrations and quotes extensively from judgments. He does not claim to have made an original contribution, but in the chapters on the law governing movables, immovables and general assignments he has succeeded in presenting a clear and fresh exposition of a difficult matter. On the other hand, certain criticisms, some trifling and some more weighty, must be voiced here. The categorical statement that if a certain type of status is unknown to English internal law English Courts will refuse to recognise and give effect to the foreign status (pp. 269, n. 2, 276, 290) is incorrect. See *Srini Vasam v. Srini Vasam* [1946] P.67, and Wolff, *P.I.L.* s. 299. Similarly, it is probably not true that 'English Courts will in all circumstances uphold the validity of marriages celebrated within the jurisdiction and valid by their own municipal law' (pp. 307, 322). See *De Massa v. De Massa* [1939] 2 All E. R. 148, *Latey on Divorce* (1940), p. 430. The Inter-Scandinavian Convention of 6 February 1931 (p. 66) combines the test of nationality with that of domicile, operative after residence for two years. *The Cristina* [1938] A.C. 485, is not an authority for the proposition that foreign requisition laws apply in certain circumstances to property outside the jurisdiction (p. 60). The term '*renvoi*' is used rather loosely when applied to the decision in *Armitage v. A.-G.* [1906] p. 135, while it may be doubted whether the summary of Falconbridge's views on *renvoi* (p. 92) accurately represents this writer's views (see (1941) 19 *Can. Bar. Rev.* 311, at pp. 332—333). The passages on classification are not quite clear (pp. 34, 35, 38, 189) and in two places (pp. 7, 31, n. 5) the impression is created that classification and the preliminary question are different terms employed to describe the same problem. Rightly or wrongly the author has intentionally refrained from discussing questions of theory, but he has not been able to avoid them altogether and the results are not entirely satisfactory. Without discussing the opinions of modern scholars (Lorenzen, W. W. Cook, the American realists, Arminjon, Cheshire) he adopts, first, the doctrine of vested rights, (p. 9), qualifies it, second, by stating that the right, when properly defined and connected, becomes a vested right (p. 32) and adopts, finally, the doctrine of the 'seat' of the legal relationship (pp. 32, 44) which Savigny first proposed in the place of the doctrine of vested rights (see Savigny, *System*, Vol. 8. p. 132, para. 361 (5)). It may be argued that a text-book on a branch of modern English Law can dispense with an exposition of the historical background, but if an attempt is made to set out the history of Private International Law the

studies of Sack (*Law, A Century of Progress*, Vol. III, p. 342) on the history of English, and of Meijers (*Académie de Droit International, Recueil des Cours*, 49 (1934), p. 574, on that of continental, Private International Law must be taken into consideration. References to irrelevant passages in the Digest (p. 13), to Accursius as the first glossator and to Bartolus as the first writer on Conflict of Laws (p. 15) would then have been avoided while the early French School of de Ravanis and Bellapertica would have obtained its due.

For *Clunet* (p. 33, n. 4), read *Darras*. On p. 315 a reference to the Indian and Colonial Divorce Jurisdiction Act, 1940, would have been useful.

K. L.

The Magistrate. By Sir ALISON RUSSELL, K.C.M.G., K.C., with a Foreword by Lord SCHUSTER, G.C.B., C.V.O., K.C. London: Butterworth & Co. (Publishers), Ltd. xiv and 162 pp. 1945. (17s. 6d.)

The author, formerly Chief Justice of Tanganyika Territory, has passed his career in the Colonial Service, and he has written this book primarily for the use of magistrates in Crown Colonies and Protectorates. It may be described as a concise guide to the administration of justice in lower courts of first instance, and likely to be as useful to the police as to magistrates.

Doubtless the book will meet a particular need in the Colonial Service, but it has a much wider interest than that because it comes near to being a book about criminal justice anywhere in the common law system. This arises from two things. In the first place the author is not writing about any particular jurisdiction, and secondly the material is arranged in short paragraphs as if it were a code. The material and arrangement inevitably lead to an appearance of certainty and absence of exceptions that are perhaps not possessed by any jurisdiction, but it brings out the main principles with a clarity that is otherwise hardly obtainable.

There are of course parts that are specialised and of little interest outside certain territories, but often situations presented as singularly likely to occur under colonial conditions are in fact problems that we meet in England. Thus at pp. 21 and 48, magistrates are warned against accepting pleas of guilty without being sure that the defendant admits responsibility for all the ingredients that go to make up the offence, particularly when an interpreter has to be used. This is one of the common troubles of English magistrates' courts, for a defendant is asked to plead to a charge that he may not really understand. He may admit that he 'did it' without knowing that the offence has complex ingredients. The charge should if necessary be explained to the defendant, but accurate translation from technical law language to ordinary English is astonishingly difficult.

And so, out of the experience of applying the English legal system in colonies, we get a clearer picture of it; we get the pith of the common law principles of criminal justice.

R. M. J.

After-Conduct of Discharged Offenders. By Professor SHELDON GLUECK and Mrs. ELEANOR T. GLUECK. Foreword by Dr. F. FRANKFURTER, and Preface by Professor P. H. WINFIELD. Macmillan. 1945. 114 pp. (Vol. V. of *English Studies in Criminal Science*. Edited by L. RADZINOWICZ and J. W. C. TURNER.) (10s. 6d.)

In 1925 one of the authors of this book presented a paper in one of the late Dr. Cabot's seminars held at Harvard University. The paper was on the penological situation in the United States, and it stressed the need for a far-reaching and systematic enquiry into the after-conduct of ex-prisoners. Four years later the

authors published in the Harvard Law Review the first chapter of their first book on this subject. In a prefatory note to this study, Dean Roscoe Pound expressed the view that a new avenue of research was being opened and indicated the future possibilities of the work which had thus been initiated. The subsequent activities of Professor and Mrs. Glueck in this virgin field of modern criminology and penology have fully corroborated this view. In the thirteen years between 1930 and 1943 they followed-up the careers of discharged offenders grouped in accordance with their age, sex, nature of offence, sentence, and the type of institution in which they had been detained. The purpose of these investigations—conducted in each case over a period of several years—was to ascertain what is the degree of effectiveness of punishments and the value of corrective methods of treatment, as well as to throw light on the incidence of recidivism and on the roots of the recurrent anti-social tendencies of so considerable a section of the community. The method and the results of these vast and laborious enquiries are described in the authors' seven impressive books, which—by general consent—have opened a new chapter in the history of modern criminology.

In 1941, the Department of Criminal Science of Cambridge University invited Professor and Mrs. Glueck to present a report which would serve as a general introduction to the 'follow-up' investigations. Within the limited compass of this publication the authors could not have been expected to expound this most complicated subject in all its manifold ramifications. The purpose of this book was to draw attention to the essentials of their method and its value for criminology in general and for the system of criminal administration in particular. These objects the authors have attained with arresting lucidity.

The progress that social consciousness has yet to achieve in order to be able better to understand the complex etiology of criminal behaviour is thus aptly described on p. 96:—

'We know that maladjustment to the demands of a legally ordered society is manifest in a great many persons at a very tender age. The mean age at which our juvenile delinquents first showed definite trends was but nine years and seven months, and over a third of the group were delinquent at eight years or less, 14 per cent. at six or less. What we said about this at the beginning of this book bears repetition here: The implication for the criminal law of the early anti-social maladjustment of so many offenders who later become "hardened criminals" is to be found in the realisation that only a few years later we condemn and punish the very acts formerly comprising mere childish maladjustment or juvenile delinquency, or others clearly growing out of them in a natural course of development, as crimes for which the now adult offender, because he acted with "criminal intent," is regarded as unquestionably "guilty," fully "responsible," and "deserving of punishment." The crossing of a magical age-line causes us radically to change our point of view: up to that line we are willing to recognise that the causes of misconduct are multiple and complex; beyond it, we suddenly endow the offender with a completely "free will" and absolute responsibility!'

Professor Winfield justly draws the attention of the reader to Chapter VIII which, in conjunction with Chapter VII, explains the value of the follow-up studies in the shaping of penal policy and for the administration of justice. The value of this book is further enhanced by the stimulating Foreword of Justice Frankfurter. The Cambridge Faculty of Law will certainly greatly appreciate Dr. Frankfurter's generosity in referring to the establishment of the Department of Criminal Science during the years of war as 'a striking piece of evidence of faith in the freedom which is espoused and of determination to use that freedom for progressively civilised ends' (p. viii).

R. M. J.

Studying Law. Selections from the writings of ALBERT J. BEVERIDGE—JOHN MAXCY ZANE—MUNROE SMITH—ROSCOE POUND—ARTHUR L. GOODHART—EUGENE WAMBAUGH—JOHN H. WIGMORE—CHARLES B. STEPHENS. Edited by ARTHUR T. VANDERBILT. New York City: Washington Square Publishing Corporation. 1945. viii and 753 pp., Index 44 pp. (\$4.75 net.)

This stimulating collection deserves an article to itself and not this brief review. It is designed specially for the man who contemplates the study of law upon his release from the Forces. *The Young Lawyer and his Background*, by Beveridge breathes the life of a practical lawyer, the 'call' to law, the tradition and glory of the profession. Zane's, *Five Ages of the Bench and Bar of England*, is a delightful and informal account of the great architects of the law. *The Elements of Law*, by Munroe Smith covers the essential aspects of the history of European, English and American Law, with due emphasis on Roman and Canon Law. Pound—the 'Schoolmaster of the American Bar'—deals with fundamental conceptions and the history of the Anglo-American system in his *Introduction to American Law*, and in his *Summary of Social Interests* he answers the questions, 'What is the law about, what is it attempting to accomplish and protect?' Goodhart, on *Determining the Ratio Decidendi of a Case*, Pound, on *Interpretation of Statutes*, and Wambaugh on *How to use Decisions and Statutes together* supply working knowledge of how to handle case law and statute in practice. In *Jury—Trial Rules of Evidence in the Next Century*, Wigmore makes lucid what is required by way of proof in law. Vanderbilt writes on Prelegal Education, that is, what subjects are best by way of preparation for a law school and for work at the bar. *Finding your place in the Legal Profession*, by Stephens, shows the variety of activities in which a legal training can be employed. There is an admirable introduction by Vanderbilt. The book will doubtless stimulate the student to a realization of his opportunities and his responsibilities as a lawyer and as a citizen.

T. E. L.

Refresher Law, 1939—1945. By the EDITORS OF "LAW NOTES." London. Law Notes Publishing Office. 1945. xi and 247 pp. (21s. net.)

Experience proves that a *Law Notes* publication can be relied upon for being accurate, up-to-date and clear. The object of this book is to provide a convenient size handy guide to the more important statutes and cases of the war period for the lawyer and student who had to abandon the law for war, defence or government service. It does not attempt to deal with the whole mass of emergency legislation such as the Defence (Emergency Provisions) Act and their Regulations, but only with the changes of a more permanent character in the law, and for this reason the Courts (Emergency Powers) Act is included. The cases, statutes and regulations are succinctly noted under headings ranged alphabetically from Administration of Estates to Workmen's Compensation and there is a good index. Reference is made to a large number of articles in *Law Notes* and these are now published separately as a companion work. An examination of a number of the titles makes it clear that the book is an extremely useful and practical guide to the returning solicitor and articulated clerk in the legal developments of September, 1939, to June, 1945.

T. E. L.

Law and Practice of Divorce and Matrimonial Causes, including proceedings in Court of Summary Jurisdiction, Statutes and the Matrimonial Causes Rules, 1944. By D. TOLSTOY, of Gray's Inn and the South-Eastern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1946. xxxv and 386 pp., Index 8 pp. (30s. net.)

The aim of the author is to give the practising lawyer concise information on all aspects of matrimonial affairs to be met with in practice, both in Court and when advising. Parts I and II deal with the law and practice of divorce and other matrimonial matters affecting husband and wife heard in the High Court, Part III deals with matrimonial proceedings in Courts of summary jurisdiction. This is a sound and comprehensive plan. The article clerk, faced with this subject in his Final, will find it readable and concise, and the author has attempted a reasonable solution on matters where the law is uncertain. The Matrimonial Causes Acts and other Statutes are set out at pp. 285—309; the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, and other Statutes applicable to Courts of Summary Jurisdiction cover pp. 310—327, and the Matrimonial Causes Rules, 1924, are at pp. 328—377. The work is clear and well written and we believe that it will hold its own with serious rivals.

T. E. L.

The Grotius Society. Transactions for the Year 1944. Problems of Peace and War. Vol. 30. London: Longmans, Green & Co., Ltd. 1945. xxiv and 287 pp. (15s. net.)

The Transactions for the first time are divided into two parts. Part I contains the proceedings of the four sessions of the International Law Conference held by the Society in 1944. It contains papers read by Sir Arnold D. McNair on 'The method whereby International Law is made to prevail in Municipal Courts on an issue of International Law'; the discussion led by Professor G. W. Keeton, V. R. Idelson, K.C., on 'The Law of Nations and the Individual'; discussion led by Professor H. Lauterpacht, C. John Colombos, LL.D., on 'The Shape of things to Come,' viz., The organisation and functions of the future International Authority; discussion led by Professor A. L. Goodhart, and an address by the President, the Rt. Hon. Viscount Finlay on 'The nature of International Law and the reasons why it is binding on States' and the general discussions. Part II contains the papers read before the Society in 1944, 'Legal Relations between Individuals and a World Organization of States,' by Hugh McKinnon Wood; 'The International Corporation' by Dr. Clive M. Schmitthoff; 'American Conception of Jurisdiction with respect to Conflicts of Law on Crime,' by Professor Lawrence Preuss; 'The Organization of Post-War Peace,' by Wing-Commander W. J. Heyting; 'Legislation for Enemy-occupied Territory in the British Empire,' by Dr. Egon Schwelb; 'Soviet Federalism and the Principle of Double Sub-ordination,' by Dr. Samuel Dobrin.

Daya-Vibhaga, or the Individualisation of Communal Property and the Communalisation of Individual Property in the Mitakshara Law. By I. S. PAWATE, M.A., LL.B., of the Bombay Provincial Judicial Service. Dharwar: S. B. Harihar. 1945. viii and 188 pp. (Rs. 2-8-0.)

The author takes as his text the famous passage in the *Mitakshara* beginning (Colebrooke's translation): 'Here the term heritage (*daya*) signifies that wealth which becomes the property of another solely by reason of relation to the owner.'

His purpose is to correct the impression conveyed by writers of Anglo-Indian

text-books that the *Mitākshara* system recognizes two modes of devolution of property, survivorship and succession. There is, he contends, one only. Every relative (not merely the son, grandson, and great grandson) acquires, at birth, ownership rights in the property held by any other relative, and, if a man purchases property, all his relatives become owners of it as their *daya*. Whether such relatives will ever be able to exercise their rights effectively is determined by the process of *pratibandha*, or obstruction. The author supports his arguments by numerous citations from Sanskrit authorities, and does not always accept the translations of other writers. In his preface he replies to friendly critics who have asked him what use a study of *Mitākshara* law can be, now that efforts are being made to supersede it by a Hindu Code. The law he says, is an edifice built up with great science and masterly skill. It has served Hindu and society for more than 3,000 years, and those, who are powerless to prevent its pulling down, may at least be allowed to prepare a sketch of it, and to preserve it.

A. C.

Chalmers' Sale of Goods Act, 1893. Twelfth Edition. By RALPH SUTTON, M.A., one of His Majesty's Counsel, Reader in Common Law to the Council of Legal Education, and N. P. SHANNON, of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1945. lxxvi and 274 pp. + Appendix 39 pp. (17s. 6d. net.)

Fourteen years have elapsed since the last edition of this most useful commentary on the Sale of Goods Act, and the editors have adhered to their policy of not contenting themselves with adding references to cases decided since the last edition, but have revised many of the notes and pruned the case references where necessary. As evidence of this, one hundred and ten cases are referred to for the first time of which some sixty odd were decided since 1931. In addition twelve new Statutes are included and of these sect. 3, Law Reform (Miscellaneous Provisions) Act, 1934; sect. 28, Finance (No. 2) Act, 1940, and the Law Reform (Frustrated Contracts) Act, 1943, have been set out in an Appendix. A temporary feature is an Appendix of Emergency Legislation affecting contracts of sale. The whole work is compact and comprehensive (there are references to more than a thousand cases) and will undoubtedly maintain its place as a handy and useful guide to the Act. There is however some evidence of hurried proof reading and of the minor blemishes in this respect we note in particular: p. xivii and p. 41, *May & Butcher v. The King* appears as *May v. Butcher*; p. 192, *Alicia v. Cohen* should read (1934) 50 T. L. R. 411; p. 112, *Broome v. Paradise* should read [1940] 1 All E. R. 603 (C. A.); and p. 215, *Love v. Norman Wright* [1944] K. B. 484; at p. 169, in the definition of 'Goods,' *served* appears instead of *severed*; and many of the cross-references (e.g., at pp. 46, 174, 185, 186, and 212) have gone astray. And we venture to think that *The Gabbiano* [1940] P. 166; *Youngs v. Youngs* [1940] 1 K. B. 760 (C. A.); and *Lloyds Bank v. Bank of America* [1938] 2 K. B. 147 (C. A.) deserve inclusion.

T. C. T.

Executors and Administrators. Fourth Edition. By N. E. MUSTOE, M.A., LL.B., of Gray's Inn, Barrister-at-Law, with Executorship Accounts by W. A. KIERAN, A.S.A.A., Lecturer in Accounting and Executorship at the City of Liverpool School of Commerce. London: Butterworth & Co. (Publishers), Ltd. 1945. xxxvi and 270 pp. (17s. 6d. net.)

This book, the last edition of which appeared in 1939, is intended not only for the law student, but for students of accountancy, banking and secretarial subjects as

well. Reference is made to some forty new cases which include those decided on the Inheritance (Family Provision) Act, 1938, and to *Re Owers* [1941] Ch. 17, which has necessitated the recasting of the chapter on distribution among beneficiaries. Some topics are necessarily compressed, but there are many useful chapters and the law student will find the practical examples on the working of the Appointment rules of considerable help. There is no reference to any of the cases, decided during the war years, on Soldiers' privileged wills, and *Ingall v. Moran* [1944] K. B. 160, is of sufficient importance on the doctrine of relation back of an administrator's authority, to deserve inclusion.

T. C. T.

Underhill's Law of Torts. Fifteenth Edition. By RALPH SUTTON, M.A., of Lincoln's Inn, one of His Majesty's Counsel; Reader in Common Law to the Council of Legal Education. London: Butterworth & Co. (Publishers), Ltd. 1946. xcvii and 416 pp. + 37 pp. Index. (20s. net.)

The changes in this edition of the popular student's text-book are not numerous, and it retains its now well known form of first stating legal principles in a summary form followed by an explanatory note with illustrative cases. The book has been well brought up to date by incorporating decisions since 1941 when the last edition was published. The most important change in the law of this subject has been the passing of the Law Reform (Contributory Negligence) Act, 1945, which came into effect while the work was in the press. The difficulty of including it has been solved by setting out the relevant sections in an appendix together with a short explanatory note which refers the student to the text for the changes effected. There is no doubt that this edition will be as useful and as popular as ever to the student coming to a study of this branch of the law.

T. C. T.

Principles of Company Law. Fourth Edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law, Recorder of Pontefract. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1945. xxxix and 261 pp. (10s. 6d. net.)

Since the last edition of this most useful Student's book appeared in 1940, very little has happened in the field of Company Law apart from Emergency Legislation; that subject the author has rightly referred to as little as possible, and has taken this opportunity to bring the book up to date by referring to such new decisions as are suitable to its scope. Company Law is inevitably a technical and somewhat forbidding subject to a student who finds himself faced with a mass of statutory detail, and the great merit of this little book is that the author's experience of teaching the subject is such that he is able to lead the student to an understanding of principle. In view of the impending changes in the law on this subject, promised by the Cohen Committee, it may well be that this will be the last edition on the present Act, and one can but express the hope that the help which this book has already given the student, will be available to a succeeding generation of students faced with the same difficulties.

T. C. T.

Full Faith and Credit: the Lawyer's Clause of the Constitution. Fourth Annual Benjamin N. Cardozo Lecture. By ROBERT H. JACKSON. New York: Columbia University Press. London: Oxford University Press (Geoffrey Cumberlege). 1945. 60 pp. (6s. 6d.)

American decisions on conflict of laws are perhaps more freely cited in England than on any other branch of private law. Where, however, they concern the recognition by one state of the Union of the judgments or statutes of another state of the Union, e.g., the two recent cases of *Williams v. North Carolina* on the recognition of decrees of divorce (decided by the Supreme Court in 1942 and 1945), a proper appraisal of their authority is difficult without a rough knowledge of the full faith and credit clause of the Constitution, which Mr. Justice Jackson, with all the authority of a judge of the Supreme Court of the United States, discusses so admirably in his lecture. He sums up the matter in the following words (pp. 52—53):—

‘Private international law and the law of conflicts extend recognition to foreign statutes or judgments by rules developed by a free forum as a matter of enlightened self-interest. The constitutional provision [sc. the full faith and credit clause] extends recognition on the basis of the interests of the federal union, which supersedes freedom of individual state action by a compulsory policy of reciprocal rights to demand and obligations to render faith and credit.’

If currency restrictions or the paper shortage make it difficult to obtain the lecture in book form, it can be read in the opening pages of Volume 45 of the *Columbia Law Review*.

D. W. L.

A Short Outline of English Legal History. Fourth Edition revised and enlarged. By HAROLD POTTER, LL.D., of Gray's Inn, Barrister-at-Law; Dean of the Faculty of Laws and Professor of English Law at King's College, London. London: 1945. xvi and 256 pp. (17s. 6d.)

Professor Potter may rest assured that in his fourth edition he has produced a readable and lively outline of legal history. It is not a summary of his longer work the *Historical Introduction*, and it contains matter not to be found there. Much overhauling has been done in this edition, the incorporation of many illustrations from the *Year Books* add to its value and interest, and so does the new chapter on Forms of Action. The chapters on Contract, Tort, Equity and Procedure have been revised and largely rewritten. A student who has read and digested the *Outline* will have a sound knowledge of the history of the main principles and institutions of English Law.

T. E. L.

Sweet & Maxwell's Guide to the Legal Profession, the London LL.B. and to Students' Law Books. London: Sweet & Maxwell, Ltd. 1945. xlvii and 80 pp. (6s. net.)

This gives all the information required for those who are starting their study of the law and those who have to advise them. Forty-seven pages are devoted to the legal profession and degrees. In fifty pages, no book of importance is omitted, and considerable assistance is given to enable the student to select the book best suited to his purpose. The remaining portion covers the citation of cases and statutes, guide to pronunciation, divisions of the law, a table of the King's Courts from the Conquest to the present day, and a subject index.

Law Training in Continental Europe : Its Principles and Public Function. By ERIC F. SCHWEINBURG, Department of Studies in the Professions, Russell Sage Foundation. New York (Public Service and Law-School Training Series). 1945. 129 pp. (\$1.00 net.)

This is a useful compilation; a comparative record of Continental legal training which may be consulted with advantage by those concerned with the refashioning of legal education after the war, and more particularly in America. A detailed account is given of the Austrian, French, German and Soviet Union systems. In the Continental European systems of legal training, the fact that a great part is played by the system of apprenticeship provided by law offices, administrative agencies and the courts, enables the law faculty within the university to fashion a broader course of study not confined exclusively to the practice of the law, and a realization of this may help Americans to make some of their law schools 'a more effective instrumentality' than they are to-day.

The Legislators of Medieval England. By HELEN CAM, Litt.D. The Raleigh Lecture on History, 1945. From the Proceedings of the British Academy. Vol. 31. Oxford University Press. 22 pp. (3s. net.)

This is an investigation of the 'originating impulses' or the 'sources of inspiration' which produced our assizes, provisions, ordinances, proclamations and statutes of the last three centuries of the Middle Ages. More particularly, it deals with the channels by which public opinion was conveyed to the legislative agencies, and is a real contribution to legal and constitutional history.

The Case for Poland. By ANN SU CARDWELL, with an Introduction by R. H. MARKHAM. Michigan: Ann Arbor. 1945. 92 pp. (\$0.25 net.)

Miss Cardwell is one of the foremost authorities in America on Eastern Europe; she describes Russia's treatment of Poland 'objectively, dispassionately and with careful documentation.' She has studied the situation on the spot between 1922 and 1939. The relations of Russia with other nations constitute a great international problem, and this book attempts to clear away the fog from Russia's relations with Poland.

A Handbook on Death Duties. Fifth Edition. By H. ARNOLD WOOLLEY, Solicitor of the Supreme Court. London: The Solicitors' Law Stationery Society, Ltd. 1945. xxxv and 243 pp. and Index 271 pp. (21s. net.)

This is the fifth edition in just under twenty years; the previous edition was published in 1942. It was never intended to cover the whole ground of this intricate subject but to be a useful book in the course of everyday practice. It is recommended by the Law Society for its Final examination. The revision and incorporation of additional matters, mainly war deaths, bombed properties, life policies, Dominion death duties, the provisions of the Finance Acts, 1942, 1943 and 1944, involve an increase of some forty pages. It is the work of a master, on a subject which is not too inviting, and the practical hints and suggestions it contains will be valued by all.

Recent Trends in English Precedent. By JULIUS STONE, LL.M., S.J.D., D.C.L., Challis Professor of Jurisprudence and International Law, University of Sydney; Solicitor of the Supreme Court; of the New Zealand Bar. Sydney: Associated General Publications Property, Ltd. London: Stevens & Sons, Ltd. 1945. 58 pp. (Table of Cases and Index), 72 pp. (10s. 6d. net.)

This publication forms one of the chapters of the Professor's book on '*The Province and Function of Law, Law as Logic, Justice and Social Control.*' It formed the basis of a series of lectures delivered by him at the invitation of the Law Committee of New South Wales, to members of the profession returned from war service. There is a wealth of references to the literature and decisions of this and many other countries.

After pointing out the fallacies of the logical form in interpretation of the French Civil Code and in the uncodified modern Roman Law, he deals with the English judicial achievement in relation to social changes, and finally with logic and justice in recent English precedent. It shows very wide research and is a challenging and penetrating analysis of the doctrine of precedent.

The Atlantic Charter : New Worlds for Old. By JULIUS STONE. Sydney: Current Books Distributors. 1945. 96 pp.

This is a second and abbreviated edition of a book bearing the same title, which appeared in 1943. The author discusses the background and the substance of the Atlantic Charter and examines its bearing upon international relations in the Pacific area. Although events have since provided the answer to some of the problems which are raised, the book will remain an interesting document illustrating the movement of ideas and expectations during the years 1941—45, and some aspects of the post-war world. Copious references to contemporary literature are included in the footnotes.

K. L.

The Conveyancers' Year Book, 1945. By Sir LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law, and R. E. MEGARRY, of Lincoln's Inn, Barrister-at-Law, Director of the Law Society's Refresher Courses, Assistant Editor of the Law Quarterly Review. Vol. 6. London: The Solicitors' Law Stationery Society, Ltd. 1945. lii and 343 pp. (25s. net.)

Vol. 6 is the best yet, and Sir Lancelot now shares the labour, and our gratitude with Mr. R. E. Megarry. It excels its predecessor in substance for cases heard in the County Courts, Quarter Sessions, Petty Sessions and other inferior Courts and cases not reported in any recognised series are incorporated. As the editors point out, although these cases are not binding authorities, 'they often suggest solutions of undecided points or give warning of unsuspected traps.' The subject matter is arranged in alphabetical order, reference is made to articles in legal journals and the precedent books and standard text-books can easily be noted up. Everything has been done to simplify the task of 'turning up' any point on case law, statutes, orders and regulations. There is a Cumulative Table of Contents of Vols. 1 to 6, an Index to Vols. 4, 5 and 6. Every note is done with thoroughness, for example, see *Hopper v. Corporation of Liverpool* (1944) 88 Sol. J. 213 (application of perpetuity rule to determinable fees) at pp. 203-6. Accuracy and ease of reference are the outstanding merits; the book is a detailed wealth of practical knowledge. This

volume has involved an immense amount of patient labour; would that the plan, the scholarship and skill of the *Conveyancers' Year Book* could be followed for the Common Law.

T. E. L.

Palmer's Company Guide. A Manual of Everyday Law and Practice. Thirty-fifth Edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1946. x and 266 pp. (5s. net.)

Palmer's Private Companies. Their Formation and Advantages and the Mode of Converting a Business into a Private Company. Thirty-ninth Edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1945. vii and 100 pp. (2s. 6d. net.)

The Essential Work Order. By H. SAMUELS, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. London: Stevens & Sons, Ltd. 1945. 38 pp. (2s. 6d. net.)

Marriage Separation and Divorce. By H. B. GRANT, M.A., of Gray's Inn, Barrister-at-Law, Formerly Senior Scholar, Trinity College, Cambridge, Lord Justice Holker Senior Scholar, Gray's Inn. London: Stevens & Sons, Ltd. 1946. 130 pp. (3s. 6d. net.)

The four books above start a new series 'This is the Law.' We congratulate Messrs. Stevens & Sons, Ltd. upon their new venture of making various branches of the law available and intelligible to the layman, in an up-to-date series of little books at a reasonable price. Dr. Charlesworth and Mr. Samuels are well-known and established authors and editors of practitioners' books. In this series, they have kept their public in mind; they have avoided technicalities and given simple explanations. *Palmer's Private Companies* is well known and deals with their formation and advantages and how to convert a business into a private company. The *Guide* is a well arranged and modernised version of *Palmer's* laudable object of supplying shareholders, directors, secretaries and others with information on the legal and practical problems connected with companies. The Cohen Report is given the importance it deserves. Mr. Samuels tells the employer and all who direct labour what they need know of the *Essential Work Order*.

Mr. Grant's book is a well written and accurate guide to the ceremony of marriage, breach of promise, rights, duties and property of husband and wife, separation orders, divorce and nullity.

Principles of the English Law of Contract. By Sir WILLIAM R. ANSON, Bart., D.C.L. Nineteenth Edition, by J. L. BRIERLY, D.C.L. Oxford: Clarendon Press. 1945. xxxvi and 455 pp. (15s. net.)

Successive editions of Anson's *Law of Contract* have been the guides for so many generations of undergraduates that it is superfluous to do more than note material changes. In the nineteenth edition the familiar and admirable pattern of arrangement has been retained though it is noticeable, on comparison with its predecessor, that occasionally a more pointedly explanatory phrase has been substituted with effect.

As part of the first chapter, Dr. Brierly has added a brief and lucid historical introduction which undergraduate students of law will find most helpful. Much

of the section devoted to the ever-puzzling topic of Mistake as to the identity of the person has been re-written and the chapter on Impossibility of Performance thoroughly revised. The reader will also be indebted to Dr. Brierly for the chapter on Quasi-Contract now wholly re-written and providing a succinct review of that difficult subject.

It is of great interest to compare a tested work on a major law subject, conceived more than sixty years ago, with those of recent inspiration. Is it impious to say that in spite of the admirably skilful remoulding there is, in the current Anson, an inevitable hint of conservatism, at least of expression, in relation to such topics as the formation of Contract?

R. P. F. R.

La Collaboration. L'Épuration, la Confiscation, les Réparations aux Victimes de l'Occupation. By P. H. DOUBLET. Paris: Librairie Générale de Droit et de Jurisprudence. 1945. 283 pp.

This is concise commentary on the laws passed by the French Government for the purpose of punishing collaborators, of purging the judiciary, civil service, professional and other bodies of unreliable elements, of confiscating unlawful gains obtained during the occupation, and of making restitution or paying compensation to the victims of the occupation. The range of the laws is wide and covers criminal, administrative and private law, as well as the law of procedure. A special characteristic is the establishment of a great number of special tribunals. This book should be studied with profit by all those in charge of the legislation of former occupied territories, and indeed of Germany itself.

K. L.

United Nations Government. By AMOS J. PEASLEE. New York: Putmann's Sons. 183 pp. (\$2.00.)

This is a popular but shrewd and constructive discussion of some problems of international organization in connection with the San Francisco Conference of May, 1945. Many of the questions raised by the author have been answered by the Charter of the United Nations, but some of the chapters, in particular those relating to the organization of the international judicial system, are by no means obsolete and deserve attention. But, primarily, this collection of essays is addressed to the American reader.

The Pocket Law Lexicon. By H. F. J. TEAGUE, LL.B., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons. Ltd. 1945. viii and 404 pp. (12s. 6d. net.)

This is concise, compact and complete. To keep within its main object, the number of references to Roman and Scots law has been reduced, old titles have been modified and new ones added, and the supplementary list of abbreviations compiled by Dr. Glanville Williams in 7 C. L. J. 262 have been incorporated in the list of reports. Under *Priority Notice* for two days substitute fourteen days. Reference to *Subinfeudation* and *Quia Emptores* does not explain the former term, and it is not made clear that the statute extended only to lands held in fee simple. It is generally agreed now that the *Year Books* were not taken by the prothonotaries at the expense of the Crown and published annually.

T. E. L.

Legal Fictions. A Series of Cases from the Classics. Reported by A. LAURENCE POLAK, B.A.(London), Solicitor of the Supreme Court. Illustrated by DIANA PULLINGER. London: Stevens & Sons, Ltd. 1945. 127 pp. (6s. net.)

The ten 'judgments' reported appeared over a period of years in *Law Notes*. They ingeniously portray modern English Law applied to the curious situations and relationships that arise between gods and mortals in the well-known stories of ancient mythology. They are amusing and instructive.

Temple University Law Quarterly. Vol. XVIII., No. 4, 1944. Vol. XIX., No. 1. 1945. Philadelphia. (\$2.00 a year.)

Leading articles are, *Pan-Americanism : Preparation for World Peace*, by C. Sumner Lobinger; *Federal Rent Control*, by Dix W. Noel; *Expanding Business and Excess Profits Tax*, by Elgin Groseclose; *Dedications by Parol to Charitable Use in Pennsylvania*, by Lester G. Rarig; *Current Law*, by Perlle P. Fallow; *Dumbarton Oaks Proposals Regarding the Settlement of International Disputes*, by Amos J. Peaslee; *Section 270 of the National Bankruptcy Act*, by Charles S. J. Banks.

The Bombay Law Journal. Vol. XXIII., Nos. 4—11. 1945.

New Jersey Law Journal. Vol. 58. No. 16. 1945, contains an article, "Modern Day Epigrams on Lawyers." By JOSEPH T. KARCHER.

Revista de Estudios Politicos. Vols. X. and XI. 1945. Also *Suplemento de Politica Social.* Nos. 1 and 2. 1945. Madrid.

Informacion Juridica. Servicio de la Comision de Legislacion Extranjera del Ministerio de Justicia. Nos. 34 and 35, 1944; 37 and 38, 1945; 40 and 41, 1945. Madrid.

Revista Juridica de la Universidad de Puerto Rico. Vol. XIII., No. 4. 1944; Vol. XIV., Nos. 1, 2, 3 and 4. Vol. XV., No. 1. 1945. (\$3.00 a year.)

Revista de Derecho Privado. No. 345. December, 1945. Madrid. (100 pesetas.)

Roman Law in a Nutshell By DAVID ELIAS, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1945. 68 pp. (6s. net.)

Useful as a revision guide read with, and not as an alternative to, the standard text books.

Correspondence Schools of Law. How considered by forty-nine State Boards of Law Examiners. *Statistics on the Population of Lawyers in Arkansas.* By ALEXANDER B. ANDREWS, Attorney and Counsellor at Law. Reprinted from the *Alabama Lawyer*, Vol. 6, No. 4. 1945. 7 pp.

Correspondence school law instruction is not recognised or permitted by 41 State Boards of Law Examiners, and the trend is to require registration of students with the State Board before beginning the study of law.

The following will be reviewed in our next number:—

Wade & Phillips. *Constitutional Law.* 3rd Edition. 1946.

Webber. *The Effect of War on Contracts.* 2nd Edition. 1946.

Cheshire & Fifoot. *Cases on the Law of Contract.* 1946.

Bentham. *Limits of Jurisprudence Defined.* 1945.

Salmond & Williams. *Principles of the Law of Contracts.* 1945.